

# **Protecting Autonomy in Non-consensual Sexual Offences: A Kantian Critique**

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# **Abstract**

## **Protecting Autonomy in Non-consensual Sexual Offences: A Kantian Critique**

The current law has been criticised on the basis that it does not provide a clear definition of consent. This criticism is important, particularly in light of the fact that the Sexual Offences Act 2003 adopts a consent-centric model in relation to the protection of sexual autonomy. Therefore, it is vital that the current model provides effective protection in relation to sexual autonomy.

This thesis will focus on the protection of autonomy in non-consensual sexual offences in sections 1-4 of the Sexual Offences Act 2003. It will be argued that sexual autonomy is a concept which should be protected and that Kantian autonomy is an effective method for the protection of sexual autonomy. Focusing on Kant's supreme principle of morality and the universalising aspect of Kantian autonomy, the thesis will argue that a re-interpretation of Kantian philosophy is an effective method for protecting sexual autonomy. The thesis will analyse the application of Kantian autonomy in a practical context in cases involving deception and non-violent coercion. It will be argued that a Kantian approach is an effective model for the protection of sexual autonomy in cases where a defendant procures sexual activity through deception or non-violent coercion.

The barriers to the application of Kantian autonomy will be examined in order to determine whether Kantian autonomy is a viable model for the protection of sexual autonomy in a practical context. This thesis concludes that a Kantian approach is capable of protecting sexual autonomy, in a practical context, in cases involving deception and non-violent coercion.

## **Declaration**

No portion of the work referred to in the thesis has been submitted in support of an application for another degree or qualification of this or any other university or other institute of learning.

## **Acknowledgements**

To my supervisors, Prof. Gavin Dingwall and Prof. Alisdair Gillespie, for their guidance, patience and friendship; to Prof. Ronnie Mackay for his encouragement and support; to Dr. John and Mrs. Jean Huntley for always being there (the mince pies are always appreciated!); to Nicky Butler for getting me through that difficult year and constantly reminding me the finish line is in sight ('one foot in front of the other'); and to Laura for never giving up on me.

## Table of Contents

Protecting Autonomy in Non-consensual Sexual Offences: A Kantian Critique .....	1
Abstract .....	2
Declaration .....	3
Acknowledgements .....	4
Abbreviations .....	9
Table of Statutes .....	11
United Kingdom .....	11
Table of Cases .....	12
Australia .....	12
Canada .....	12
England and Wales .....	12
Germany .....	13
International Criminal Tribunal for the former Yugoslavia .....	14
United States of America .....	14
Chapter One: Introduction .....	15
Autonomy .....	16
Kantian autonomy .....	18
Background to the current law of sexual offences .....	20
Parameters of the research .....	23

Research questions.....	23
Methodology .....	23
Doctrinal research .....	25
Socio-legal research .....	27
Jurisprudential analysis .....	28
Why Kant? .....	30
Chapter synopsis .....	34
Chapter Two: Kantian Autonomy.....	35
Introduction.....	35
Autonomy .....	35
Philosophical autonomy.....	37
Personal autonomy.....	41
Moral autonomy.....	42
Legal autonomy .....	44
Kantian autonomy.....	46
Kantian morality .....	47
The Supreme Principle of Morality .....	49
The first formula of the Categorical Imperative .....	52
The second formula: humanity as an end in itself .....	56
The third formula: autonomy and the kingdom of ends .....	59
‘Capacity’ and ‘choice’ in Kantian autonomy.....	62

Importance of Kantian autonomy .....	63
Kantian Autonomy: A Feminist Critique.....	66
Feminist critique of the law of rape .....	74
The impact of patriarchy on sex offences law .....	78
Sexual objectification.....	81
Chapter Three: An Analysis of the law of sexual offences prior to the Sexual Offences Act 2003.....	86
Historical developments relating to the protection of sexual autonomy.....	87
A Consent-centric model .....	89
Common law definition of consent.....	93
Procuring sexual intercourse by deception .....	98
Fraud as to the nature of the act .....	100
Fraud as to the identity of the person.....	105
Conclusion .....	107
Chapter Four: The Current Law of Sexual Offences in England & Wales .....	109
Introduction.....	109
A Consent-centric model .....	109
Agreement by choice .....	112
Freedom and capacity .....	118
Evidential presumptions as to consent.....	124
Conclusive presumptions as to consent under the Sexual Offences Act 2003 .....	126

Deception as to the nature or purpose of the act.....	127
Impersonating a person known personally to the complainant.....	136
Limitations of the Sexual Offences Act 2003.....	138
Conclusion .....	142
Chapter Five: Practical Limitations to Kantian autonomy .....	143
Introduction.....	143
External obstacles .....	145
Internal obstacles .....	154
Chapter Six: Conclusion .....	160
The role of law, practice and policy in relation to a Kantian model.....	169
Conclusion .....	172
Bibliography .....	174



## **Abbreviations**

Arch	Archbold
Bell	Bell's Crown Cases Reserved
Car & K	Carrington & Kirwan's Nisi Prius Reports
Car & P	Carrington & Payne's Nisi Prius Reports
CI	Categorical Imperative
CL & J	Criminal Law and Justice
CLR	Commonwealth Law Reports
CLT	Canadian Law Times
Cox CC	Cox's Criminal Cases
Crim App R	Criminal Appeal Reports
Crim L R	Criminal Law Review
Crim	Criminal
CSLR	Cambridge Student Law Review
CUP	Cambridge University Press
EWCA Crim	Court of Appeal, Criminal Division
EWHC	England & Wales High Court (Administrative Court)
Harv LR	Harvard Law Review
HI	Hypothetical Imperative
HUP	Harvard University Press

J Crim L	Journal of Criminal Law
KB	King's Bench
LR	Law Review
MLR	Modern Law Review
NYU	New York University
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
PUP	Princeton University Press
QB	Queen's Bench
Rev	Review
Russ & Ry	Russell & Ryan's Crown Cases Reserved
SCR	Supreme Court Reports
SOA	Sexual Offences Act
SUP	Stanford University Press
UCL JL and L	University College London Journal of Law and Jurisprudence
UCL Juris Rev	University College London Jurisprudence Review
WLR	Weekly Law Reports
Wm and Mary L Rev	William and Mary Law Review

## **Table of Statutes**

### **United Kingdom**

Criminal Justice and Public Order Act 1994

Criminal Law Amendment Act 1885

Sex Offenders Act 1997

Sexual Offences (Amendment) Act 1976

Sexual Offences Act 1956

Sexual Offences Act 2003

## Table of Cases

### Australia

*R v Papadimitropoulos* (1957) 98 CLR 249

### Canada

*R v Cuerrier* [1998] SCR 371

### England and Wales

*Assange v Swedish Prosecution Authority* [2011] EWHC 2849 (Admin)

*R v B* [2007] 1WLR 1567

*R v Barrow* (1868) 11 Cox CC 191

*R v Camplin* (1845) 1 CAR & K 746

*R v Case* (1850) 4 Cox CC 220

*R v Clarence* (1888) 22 QBD 23

*R v Clarke* (1849) 2 Car & K 957

*R v Dica* [2004] EWCA Crim 1103

*R v Dimes* (1912) 7 Cr App R 43

*R v EB* [2006] EWCA Crim 2945

*R v Elbekkay* [1995] Crim LR 163

*R v Flattery* (1877) 2 QBD 410

*R v Fletcher* (1859) Bell 63

*R v Green* [2002] EWCA Crim 1501

*R v Harling* (1938) 26 Cr App R 127

*R v Howard* (1966) 50 Cr App R 56

*R v Jackson* (1822) Russ & Ry 487

*R v Kirk* [2008] EWCA 434

*R v Konzani* [2005] EWCA Crim 706

*R v Linekar* [1995] 2 QB 250

*R v Malone* [1998] 2 Cr App 447

*R v McNally (Justine)* [2013] EWCA Crim 1051

*R v Olugboja* [1982] QB 320

*R v Piper* [2007] EWCA Crim 2151

*R v R* [1991] 3 WLR 767

*R v Richardson* [1998] 2 CR App R 200

*R v Stanton* (1844) 1 Car & K 415

*R v Tabassum* [2002] 2 Cr App R 328

*R v Williams* (1838) Car & P 286

*R v Williams* [1923] 1 KB 340

*R (F) v Director of Public Prosecutions* [2014] 2 WLR 190

## **Germany**

*Microconsensus* (1969) 27 BVerfGE 1

**International Criminal Tribunal for the former Yugoslavia**

*Prosecutor v Kunarac*, Case No IT-96-23-T & IT-96-23/1-T

**United States of America**

*Coker v Georgia* (1977) 433 US 584, 597

## Chapter One: Introduction

This thesis will conduct a critical analysis of the law of non-consensual sexual offences,<sup>1</sup> in England and Wales, to determine whether the current law of sexual offences is consistent with Kantian autonomy. The thesis will focus on non-consensual sexual offences such as rape and sexual assault, because the reported cases are primarily concerned with these offences. The underlying research hypothesis is that Kantian autonomy is an effective method for protecting sexual autonomy.

There is a considerable amount of scholarship providing critical analysis of the current law of sexual offences.<sup>2</sup> There is also substantial academic writing on Kantian autonomy.<sup>3</sup> This thesis offers a critical analysis of the law of sexual offences using Kantian autonomy to determine whether the law of sexual offences adequately protects sexual autonomy. It will also offer a re-interpretation of Kantian autonomy in order to overcome any barriers which may hinder its application in a practical context.

In his analysis of human agency, Kant begins with the proposition that all practical rules appear to us as imperatives (commands). Kantian morality cannot be based on purely empirical considerations, such as desires and interests, because these factors are variable and contingent.<sup>4</sup> Kant asserts that there are two types of imperatives, a categorical and hypothetical. Hypothetical Imperatives (HI) are based on desires and inclinations, and command individuals to act on ends which are based on interest. The categorical imperative (CI), on the other hand, can be used as a moral rule which prevents individuals from acting immorally. The CI is unconditional and cannot be discarded, unlike desires and interests,

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<sup>1</sup> Sexual Offences Act 2003, ss 1 - 4.

<sup>2</sup> E.g. V. Tadros, 'No Consent: A Historical Critique of the *Actus Reus* of Rape' (1999) 3(3) Edin LR 317; P. N. S. Rumney, 'The review of sex offences and rape law reform: another false dawn?' (2001) 64(6) MLR 890; J. Temkin, *Rape and the Legal Process* (2<sup>nd</sup> edn, OUP 2002); E. Finch and V. E. Munro, 'Intoxicated consent and the boundaries of drug assisted rape' [2003] Crim LR 773; S. Cooper and A. Reed, 'Informed consent and the transmission of sexual disease: Dadson revived' (2007) 71(5) J Crim Law 461; T. Khan, 'Voluntary intoxication and consent in cases of rape' (2013) 177(8) CL & J 114; N. Wortley, 'Limiting the scope of the conclusive presumptions in the Sexual Offences Act 2003' (2013) 77(5) J Crim L 370.

<sup>3</sup> J. Christman (ed), *The Inner Citadel: Essay on Individual Autonomy* (OUP 1989); P. Powlesland, 'Male rape and the quest for gender-neutrality in the Sexual Offences Act 2003' (2005) 1(1) CSLR 11; M. D. White, *Kantian Ethics and Economics: Autonomy, Dignity and Character* (SUP 2011).

<sup>4</sup> I. Kant, *Groundwork of the Metaphysics of Morals* (H. J. Paton tr, Routledge 1989), 77.

because morality is grounded in an individual's own reason.<sup>5</sup> In order for individuals to act morally, the CI must serve as their ultimate norm. Acting according to the CI is made possible because rational individuals view the world from two standpoints,<sup>6</sup> the sensible world and the intelligible world.<sup>7</sup> Quek notes that:

When we imagine ourselves trying to understand how we affect and are affected in the world of sense (the 'phenomenal world'), we have to regard ourselves as subject to the laws of causal determination. Because we reason practically about how we should act, we belong to the intelligible world (the 'noumenal world'), where we are free from all causal determination and are bound only by the moral law as autonomous beings.<sup>8</sup>

In order to attain freedom, in a Kantian sense, individuals are required to view themselves from the standpoint of a rational agent, not merely an object. Individuals, according to Kantian autonomy, are not merely empirical beings, but are also members of the intelligible world.<sup>9</sup> Individuals who view themselves and others from the standpoint of an object risk acting in violation of the CI and, therefore, their actions may lack autonomy. This thesis will argue that a CI can assist in the protection of sexual autonomy in a practical context.

## **Autonomy**

It will be shown that since the removal of the resistance requirement from the offences of rape, the law of non-consensual sexual offences has undergone a radical change.

The earliest judicial statement that rape is a violation of autonomy was probably the case of *Coker v Georgia*, in which the Supreme Court stated that:

We do not discount the seriousness of rape as a crime. It is highly reprehensible, both in a moral sense and in its almost total contempt for the personal integrity and

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<sup>5</sup> Ibid, 78.

<sup>6</sup> Ibid, 111.

<sup>7</sup> Ibid.

<sup>8</sup> J. Quek, 'Our brain "Kant" tell us? A Kantian perspective of how neuroscience challenges our notions of moral responsibility and the legal implications' [2012] UCL JL and J 22, 25.

<sup>9</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 111.



autonomy of the female victim and for the latter's privilege of choosing with whom intimate relationships are to be established. Short of homicide, it is the "ultimate violation of self".<sup>10</sup>

The case of *Coker* provides an explanation as to the distinctive violation affected by rape, in that it violates the complainant's sexual autonomy by impacting on the complainant's right to choose with whom to engage in sexual intercourse.

Academics such as Herring,<sup>11</sup> Munro,<sup>12</sup> and Schulhofer<sup>13</sup> highlight the importance of treating the consent of sexual autonomy as rape law's central principle. According to Falk:

[T]he central value protected by sexual offense provisions is sexual autonomy or sexual integrity, the violation of which represents a unique, not readily comparable, type of harm to the victim.<sup>14</sup>

The International Criminal Tribunal for the Former Yugoslavia, stated in *Prosecutor v Kunarac*, that the 'true common denominator' of rape may be the 'violation of sexual autonomy'.<sup>15</sup> According to Germany's constitution (the Grundgesetz or Basic Law) states, at Article 1(1), that, 'human dignity shall be inviolable'. The philosophy of Immanuel Kant has been described as a major influence on the Basic Law and the German Federal Constitutional Court. In the *Microcensus* case,<sup>16</sup> the German Constitutional Court explained that:

In light of this image of man, every human being is entitled to social recognition and respect in the community. The state violates human dignity when it treats persons as mere objects.<sup>17</sup>

The above quote clearly draws on Kantian autonomy which states that:

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<sup>10</sup> (1977) 433 US 584, 597.

<sup>11</sup> J. Herring, 'Mistaken Sex', [2005] Crim LR 511.

<sup>12</sup> V. E. Munro, 'Constructing Consent: Legislating Freedom and Legitimizing Constraints in the Expression of Sexual Autonomy' (2008) 41 Akron LR 923.

<sup>13</sup> S. J. Schulhofer, *Unwanted Sex: Culture of Intimidation and Failure of Law* (HUP 2000).

<sup>14</sup> P. J. Falk, 'Rape By Drugs: A Statutory Overview and Proposals for Reform' (2002) 44 Ariz LR 131, 187.

<sup>15</sup> *Prosecutor v Kunarac*, Case No IT-96-23-T & IT-96-23/1-T, Judgment, paragraph 440 (International Criminal Tribunal for the Former Yugoslavia February 22, 2002), para 440.

<sup>16</sup> (1969) 27 BVerfGE 271.

<sup>17</sup> *Microconsensus* (1969) 27 BVerfGE 1.

Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.<sup>18</sup>

This thesis will examine Kant's supreme principle of morality in order to demonstrate that Kant's Formula of Universal Law (FUL) can assist in protecting sexual autonomy in cases involving deception and non-violent coercion.

### **Kantian autonomy**

The importance of Kantian philosophy is highlighted by Waldron who states that:

The philosophical writings of Immanuel Kant continue to exert a powerful influence in legal philosophy. In theoretical discussions of criminal law, the law of property, tort law, and many other areas, Kant's works are widely regarded as an important source of nonutilitarian ideas about distributive, corrective, and retributive justice.<sup>19</sup>

This thesis will provide a critical analysis of Kantian autonomy in order to examine the barriers to its application in a practical context. It will be shown that a Kantian model for the protection of sexual autonomy is a far more effective method than a non-consent centric model. The thesis will also highlight that Kantian autonomy can be applied to the current law of non-consensual sexual offences,<sup>20</sup> in order to increase the protection of sexual autonomy in relation to cases involving deception, fraud and mistake.

Kantian philosophy can be applied to the protection of sexual autonomy because the concept of freedom plays an important role in Kantian autonomy. In his lectures on ethics, Kant is reported to have stated that '[f]reedom...is the capacity which confers unlimited usefulness on all the others', and that it is 'the highest degree of life'.<sup>21</sup> Freedom plays a part in the

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<sup>18</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 91.

<sup>19</sup> J. Waldron, 'Kant's Legal Positivism' (1995) 109 Harv LR 1535, 1535-36.

<sup>20</sup> Sections 1-4 of the Sexual Offences Act 2003.

<sup>21</sup> I. Kant, *Lectures on Ethics* (P. Heath tr, CUP 1997), 347.

definition of autonomy, because autonomy is sometimes synonymous with freedom.<sup>22</sup> This thesis will provide a critical analysis of Kantian autonomy in order to determine to what extent Kantian autonomy can be applied in a practical context to cases involving procuring sexual activity through the use of deception and non-violent coercion. It will be argued that Kantian philosophy can be applied to the current law of non-consensual sexual offences in order to enhance the protection of sexual autonomy, specifically in relation to cases involving deception, mistake and non-violent coercion. The advantage of using Kantian philosophy, for the protection of sexual autonomy, in preference to other principles, such as the harm principle, is best illustrated using Kant's example of the false promisor who wishes to borrow money but has no intention of returning it:

‘Whenever I believe myself short of money, I will borrow money and promise to pay it back though I know this will never be done.’ Now this principle of self-love or personal advantage is perhaps quite compatible with my own entire future welfare; only there remains the question ‘Is it right?’ I therefore transform the demand of self-love into a universal law and frame my question thus: ‘How would things stand if my maxim became a universal law?’ I then see straight away that this maxim<sup>23</sup> can never rank as a universal law of nature and be self-consistent, but must necessarily contradict itself. For the universality of a law that every one [sic] believing himself to be in need can make any promise he pleases with the intention not to keep it would make promising, and the very purpose of promising, itself impossible, since no one would believe he was being promised anything, but would laugh at utterances of this kind as empty shams.<sup>24</sup>

From the above example, it appears that Kantian autonomy offers an alternative account of duties and rights, distinct from utilitarian and libertarian accounts. Kantian autonomy rejects false promises, not simply because of their harmful consequences, but because they are at odds with the CI. Making a false promise is wrong, according to Kant, because the false promisor is placing his needs and desires above the interests of others. The universalising

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<sup>22</sup> J. Rubenfeld, ‘The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy’ (2013) 122 The Yale Law Journal 1372, 1418.

<sup>23</sup> A principle that gives the reason for a person's actions.

<sup>24</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 85.

aspect of Kantian autonomy serves as an indicator in determining if the action an individual is about to take places his interests and circumstances above the interests of others. It will be argued that Kantian autonomy can provide a deontological framework that a rational person could use to make moral decisions in relation to procuring sexual activity.

### **Background to the current law of sexual offences**

The Government considered that the existing law on sexual offences was ‘archaic, incoherent and discriminatory,’ and that it failed to reflect ‘changes in society and social attitudes’.<sup>25</sup> The recommendation was a Home Office-led review entitled *Setting the Boundaries*.<sup>26</sup> The principle recommendations of this review were developed into a White Paper, *Protecting the Public*,<sup>27</sup> which set out the main policy framework on which the Government were to legislate. The key principle contained within the White Paper appears to have been the modernisation of the law. Lacey reports that the existing law on sexual offences was badly in need of reform because it had developed in a piecemeal fashion and was inconsistent.<sup>28</sup> The Home Office-led review of sex offences, also known as the Sex Offences Review (SOR), made recommendations regarding personal autonomy. The Government considered the clarification of the law on consent as particularly important.<sup>29</sup> The focus of the SOR’s recommendations was on personal autonomy, on the prevention of sexual abuse or exploitation and on the removal of discrimination in sex offences legislation.<sup>30</sup> In relation to sexual autonomy and consent, the SOR stated that:

[T]he criminal law has a vital role to play where sexual activity is not consensual, or where society decides that children and other very vulnerable people require protection and should not be able to consent. It is quite proper to argue in such situations that an adult’s right to exercise sexual autonomy in their private life is not absolute, and society

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<sup>25</sup> Home Office, *Protecting the Public: Strengthening Protection Against Sex Offenders and Reforming the Law on Sexual Offences* (Cm 5668 2002), para 4.

<sup>26</sup> Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences, Volume 1* (2000).

<sup>27</sup> Home Office *Protecting the Public* (n25).

<sup>28</sup> N. Lacey, ‘Beset by Boundaries: the Home Office Review of Sex Offences’ [2001] Crim LR 3.

<sup>29</sup> HL Deb 13 February 2003, vol 644, col 772, per Lord Falconer.

<sup>30</sup> R. Card, A. A. Gillespie and M. Hirst, *Sexual Offences* (Jordan Publishing 2008), 2.

may properly apply standards through the criminal law which are intended to protect the family as an institution as well as individuals from abuse.<sup>31</sup>

Despite emphasising the importance of sexual autonomy, the SOR failed to provide a definition of this concept. The principle statute before the Sexual Offences Act 2003 (SOA 2003)<sup>32</sup> was the Sexual Offences Act 1956 (SOA 1956). The SOA 1956 was a consolidation statute, and the majority of the offences contained therein were drawn from Victorian statutes.<sup>33</sup> Consequently, the SOA 1956 did not reflect recent changes in morality, society and social attitudes. Many of the offences were gender-specific in terms of both the offender and the victim. As a result, one of the aims of the Home Office recommendations was that the law should set out clearly what was unacceptable behaviour and provide penalties that reflected the seriousness of the offence committed.<sup>34</sup>

The SOA 2003 is the first legislation in England and Wales to provide a statutory definition of 'consent'.<sup>35</sup> Prior to the SOA 2003, the leading authority in relation to the definition of consent was the decision of the Court of Appeal in *R v Olugboja*.<sup>36</sup> The Court in this case rejected submissions that consent in rape could be vitiated only by incapacity, physical force, threats of violence or fraud as to the nature of the act. Instead, the Court held that where an issue of consent arose, the question for the jury was whether the complainant consented in the 'ordinary meaning' of the word.<sup>37</sup> 'Consent', according to the Court, 'covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other'.<sup>38</sup> Chapter three will illustrate that this definition has been criticised on the grounds that it can lead to inconsistencies.

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<sup>31</sup> Home Office *Protecting the Public* (n25), para 0.7.

<sup>32</sup> Came into force on the 1<sup>st</sup> May 2004.

<sup>33</sup> Card *et al* (n30), 2.

<sup>34</sup> Home Office *Protecting the Public* (n25), para 5.

<sup>35</sup> Sexual Offences Act 2003, s 74.

<sup>36</sup> [1982] QB 320. This case will be discussed in more detail in chapter three.

<sup>37</sup> *Ibid*, 333.

<sup>38</sup> *Ibid*, 331.

In relation to the offences of rape and sexual assault, the Home Office-led review stated that these are:

[P]rimarily crimes against the sexual autonomy of others. Every adult has the right and the responsibility to make decisions about their sexual conduct and to respect the rights of others. No other approach is viable in a society that values equality and respect for the rights of each individual. We concluded consent was the essential issue in sexual offences, and that the offences of rape and sexual assault were essentially those of violating another person's freedom to withhold sexual contact.<sup>39</sup>

Under s 74 of the SOA 2003, consent is defined in these terms:

A person consents if he agrees by choice, and has the freedom and capacity to make that choice.

This definition is supplemented in certain circumstances by 'evidential' and 'conclusive' presumptions contained in ss 75 and 76 respectively. Despite the laudable aims of the review, the SOA 2003 has not been without its critics. Lacey argues that the remit of the review was too limited, while Spencer contends that the SOA 2003 has over-extended the reach of the criminal law.<sup>40</sup> Rumney and Fenton write that:

Since the introductions of the 2003 Act, there has emerged a scholarly consensus that has raised serious concerns regarding the current definition of consent and the lack of guidance given to rape jurors.<sup>41</sup>

Elliot and de Than stated in 2007 that: '[g]iven the pivotal role it can play in determining the defendant's guilt, there is remarkably little case law on the meaning of consent in sex offences'.<sup>42</sup> This position has not changed since the above claim.

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<sup>39</sup> Home Office *Setting the Boundaries* (n26), para 2.7.2.

<sup>40</sup> J. R. Spencer, 'Sexual Offences Act 2003 (2): Child Family Offences' [2004] Crim LR 347.

<sup>41</sup> P. Rumney and R. Fenton, 'Intoxicated Consent in Rape: *Bree* and Juror Decision-Making' (2008) 71 MLR 279, 288.

<sup>42</sup> C. Elliott and C. de Than, 'The Case for a Rational Reconstruction of Consent in Criminal Law' (2007) 70(2) MLR 225, 236.

## **Parameters of the research**

This thesis will examine Kant's supreme principle of morality in order to argue that Kantian autonomy is an effective method for protecting sexual autonomy with regards to adults with mental capacity. Kantian autonomy is concerned with rational adults forming decisions which can be universalised. Consequently, cases involving an intoxicated complainant<sup>43</sup> and sex offences relating to minors will not be pursued. Therefore, an analysis of the law of non-consensual sexual offences in sections 1-4 of the SOA 2003 will be carried out. These offences deal with rape, assault by penetration, sexual assault and causing a person to engage in sexual activity without consent. The cases which will be analysed are primarily concerned with rape and sexual assault, because the majority of cases which are appealed deal with these offences.

## **Research questions**

The questions which will be addressed concern whether a Kantian model is more effective in terms of protecting sexual autonomy than the previous model, and whether the current law of sexual offences is consistent with Kantian autonomy. This thesis will also critically examine whether a Kantian interpretation of the current law of sexual offences can protect sexual autonomy in cases involving deception and non-violent coercion. The thesis will address whether there are any barriers to the application of a Kantian model in a practical context.

## **Methodology**

According to Banaker and Travers:

[E]stablished disciplines use methodology to monitor and sustain the quality of the research conducted within their realms, but also to 'discipline' the new comers. In other words, methodology, has two closely related functions: It, firstly, guarantees a degree of quality control and, secondly, it ensures the internalisation of standards

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<sup>43</sup> E.g. *R v Bree* [2007] EWCA Crim 256.

and values underlying any particular discipline by the new comers to the discipline.<sup>44</sup>

Among the various accepted methodologies within the discipline of law are doctrinal studies, jurisprudence and socio-legal studies. These three methodologies will be used in analysing the primary<sup>45</sup> and secondary sources<sup>46</sup> of law used in this thesis. To distinguish between the different methodologies used in this thesis, Arthurs' taxonomy of legal research styles serves as a useful illustration of the various categories of legal research.<sup>47</sup> It is presented a matrix in Figure 1:

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<sup>44</sup> R. Banaker and M. Travers, 'Law, Sociology and Method' in R. Banaker and M. Travers (eds) *Theory and Method in Socio-Legal Research* (Hart Publishing 2005), 4.

<sup>45</sup> Case law and legislation.

<sup>46</sup> Academic writings, policy papers and Parliamentary debates.

<sup>47</sup> H. W. Arthurs, *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (Social Sciences and Humanities Research Council of Canada 1983), 63-71.



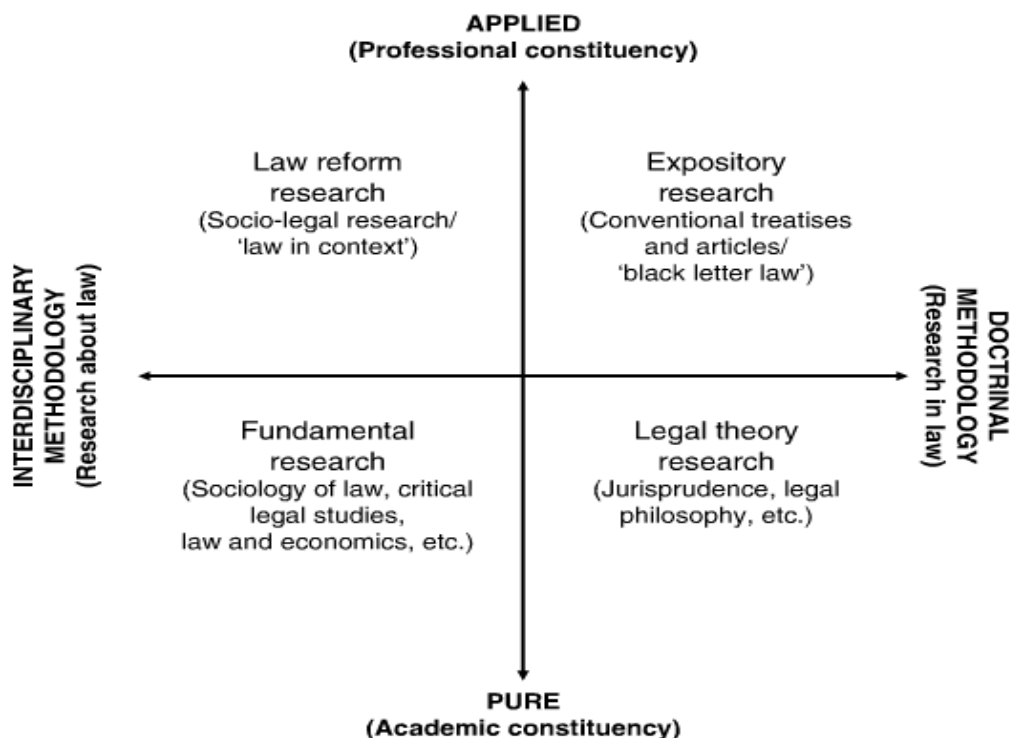


Figure 1

### Doctrinal research

The area designated by the upper right quadrant is considered the basis for most legal research projects.<sup>48</sup> Chynoweth argues that 'this form of scholarship has always been the dominant form of academic legal research and has an important role to play in the development of legal doctrines through the publication of conventional legal treaties, articles and textbooks'.<sup>49</sup> He states that doctrinal research is 'concerned with the discovery and development of legal doctrines'.<sup>50</sup> In England and Wales, doctrinal study places importance on legislation and judicial precedents, while also recognising academic works. Doctrinal research can therefore be described as an exercise in 'deductive logic' based on the available

<sup>48</sup> T. Hutchinson, 'Doctrinal research: researching the jury' in D. Watkins and M. Burton (eds) *Research Methods in Law* (Routledge 2013), 7.

<sup>49</sup> P. Chynoweth, 'Legal Research' in A. Knight and L. Ruddock (eds), *Advanced Research Methods in the Built Environment* (Blackwell 2008), 31.

<sup>50</sup> *Ibid*, 30.

legal sources.<sup>51</sup> Doctrinal research questions tend to take the form of asking ‘what is the law?’ in a particular context, by carrying out an interpretive and qualitative analysis.<sup>52</sup>

Black-letter analysis assists in interpreting disputes in a strictly legalistic manner, from the perspective of lawyers within the legal process.<sup>53</sup> Black-letter analysis usually employs a purely deductive form of legal reasoning from legal principles.<sup>54</sup> The researcher is not expected to engage in fundamental criticisms of the nature and operation of social institutions.<sup>55</sup> The purpose of black-letter analysis is to provide ‘a detailed and highly technical commentary’ upon the content of legal doctrine.<sup>56</sup> The priority is to gather, organise and describe legal rules, and comment on the authoritative legal sources that contain these rules, namely case law.<sup>57</sup> The current law, as well as the previous law, of non-consensual sexual offences will be examined in order to determine its application in relation to the protection of sexual autonomy.

This approach is not sufficient for the purposes of this thesis because it relies heavily on using court judgments and statutes to explain law.<sup>58</sup> Black-letter analysis offers a limited mode of enquiry due to the particular standpoint which must be adopted. The standpoint which must be adopted is that of a judge or barrister engaging in ‘conflicts of interpretation regarding the meaning and scope of points of law contained in reported cases, particularly those stemming from the senior courts’.<sup>59</sup> Such analysis places heavy emphasis on the judgments of the appellate courts regarding the precise meaning and scope of the contested points of law.<sup>60</sup> The restrictive nature of black-letter analysis is caused by its focus on court judgments and statutes to explain the law.

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<sup>51</sup> Ibid, 31.

<sup>52</sup> Ibid, 30.

<sup>53</sup> M. Salter and J. Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Pearson 2007), 45.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid, 49.

<sup>57</sup> Ibid.

<sup>58</sup> M. McConville and W. H. Chui ‘Introduction and Overview’ in M. McConville and W. H. Chui (eds) *Research Methods for Law* (Edinburgh University Press 2007), 3.

<sup>59</sup> Salter and Mason (n53), 79.

<sup>60</sup> Ibid, 80.

Cases, statutes and academic commentaries, which form the basis of the black-letter approach, can also be analysed with equal merit by alternative approaches.<sup>61</sup> These alternative approaches include socio-legal studies, sociology of law and feminist critique.<sup>62</sup> Socio-legal methodology will be used to superimpose on the analysis of cases and statutes a Kantian perspective, in relation to the protection of sexual autonomy in a practical context.

### Socio-legal research

This thesis adopts both doctrinal and socio-legal methodologies. This approach follows Chynoweth's argument that:

[I]t is probably incorrect to describe the process of legal analysis as being dictated by a 'methodology'...The process involves an exercise in reasoning and a variety of techniques are used...with the aim of constructing an argument which is convincing according to accepted and instinctive conventions of discourse within the discipline.<sup>63</sup>

A socio-legal approach will be deployed in order to investigate the impact of adopting a Kantian framework to the protection of sexual autonomy in a practical context. The importance of employing this methodology is highlighted by Cotterell's claim that:

Socio-legal scholarship in the broadest sense is the most important scholarship presently being undertaken in the legal world. Its importance is not only in what it has achieved, which is considerable, but also in what it promises.<sup>64</sup>

Socio-legal methodology has been defined as 'an interdisciplinary subject with particular ties with sociology'.<sup>65</sup> An interdisciplinary approach will be employed in order to apply a Kantian critique to the law of non-consensual sexual offences. The analysis will determine whether the current law of sexual offences protects autonomy within a Kantian framework. The analysis will also be used to explore the impact of adopting Kantian autonomy in a

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<sup>61</sup> Ibid, 49.

<sup>62</sup> Ibid.

<sup>63</sup> Chynoweth (n49), 34-35.

<sup>64</sup> R. Cotterell, *Law's Community* (OUP 1995), 314.

<sup>65</sup> Banaker and Travers (n44), 1.

practical context, with regards to protecting sexual autonomy in cases involving deception and non-violent coercion. Chapter six will critically analyse the impact of Kantian autonomy in a practical context. Therefore, socio-legal analysis will be used to bridge the gap between ‘law in action’ and ‘law in books’.<sup>66</sup> Criticism of socio-legal approaches concern the fact that it is tied inextricably to specific and liberal approaches, and thereby predisposed towards a reform agenda.<sup>67</sup> The aim of this thesis is to apply a Kantian analysis to the current law of non-consensual sexual offense in order to increase the protection of sexual autonomy in cases involving deception and non-violent coercion. Kantian analysis will be applied in order to increase the protection of sexual autonomy, which involves suggesting reforms in relation to applying a more effective model for the protection of sexual autonomy in a practical context. The criticism levelled at this approach does not apply to this research, because socio-legal methodology is employed due to the fact that it will be used to suggest possible reforms for the protection of sexual autonomy.

### Jurisprudential analysis

A jurisprudential analysis will also be carried out in this thesis which will involve an examination of the principles of natural law in order to determine whether Kantian philosophy can be applied in a practical context to the protection of sexual autonomy. Natural law is said to provide ‘a name for the point of intersection between law and morals’.<sup>68</sup> The essence of natural law is said to lie in the claim that there are objective moral principles that depend on the nature of the universe, and these principles can be discovered by reason.<sup>69</sup> One of the main obstacles which natural law must overcome is the tension between what ‘is’ and what ‘ought’ to be.<sup>70</sup> Natural law must establish whether an ‘ought’ can be construed as an ‘is’. One method by which natural law seeks to resolve this issue is by

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<sup>66</sup> Salter and Mason (n53), 152.

<sup>67</sup> Ibid, 180.

<sup>68</sup> A. P. D. D’Endtreves, *Natural Law: Introduction to Legal Philosophy* (C. J. Nederman ed, 3<sup>rd</sup> ed, Transaction Publishers 1994), 116.

<sup>69</sup> M. D. A. Freeman, *Lloyd’s Introduction to Jurisprudence* (7<sup>th</sup> edn, Sweet & Maxwell 2004), 90.

<sup>70</sup> Ibid.

arguing that ‘if it is a natural law for men to act in a particular way...then he ought morally to act in this way’.<sup>71</sup>

Natural law can be distinguished from positivism, which was first used by Auguste Comte, who was of the opinion that sociology should model itself on the natural sciences, and aim to produce objective findings in relation to the structure of society.<sup>72</sup> This thesis will not employ a positivistic paradigm because positivist research places an emphasis on the importance of cause-and-effect in experiments, and is primarily concerned with quantifying relationships between variables.<sup>73</sup>

Natural law, on the other hand, is believed to be a rational foundation for moral judgment.<sup>74</sup> This thesis will examine whether the current law of non-consensual sexual offences is consistent with Kantian autonomy. This will involve analysing whether Kantian autonomy can assist in determining the circumstances in which an individual’s autonomy is violated in cases involving deception and non-violent coercion. Kant has been described as a ‘bridge thinker’ whose ideas were influenced by the philosophical opinions of the Greeks and Aquinas, and also impacted on contemporary critical thought.<sup>75</sup> The importance of using Kantian autonomy, in this thesis, is due to Kant’s argument that freedom is equated with autonomy, and the subjection to any external source other than oneself amounts to heteronomy.

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<sup>71</sup> Ibid, 91.

<sup>72</sup> A. Comte, *System of Positive Polity*, vol 1-4 (NY, Burt Franklin 1968).

<sup>73</sup> W. H. Chui, ‘Quantitative Legal Research’ in M. McConville and W. H. Chui (eds) *Research Methods for Law* (Edinburgh University Press 2012), 46.

<sup>74</sup> Freeman (n69), 90.

<sup>75</sup> Ibid, 118.

## Why Kant?

Christman notes that:

Whatever contemporary approach to the topic of autonomy one finds appealing, the debate over the concept will inevitably be framed by the baggage inherited from Kant's theory of autonomy.<sup>76</sup>

A person is autonomous, in a Kantian sense, when they are in a position to subject one's will to self-imposed maxims which conform to the moral law.<sup>77</sup> The main hypothesis in this thesis is that Kantian autonomy is an effective method for the protection of sexual autonomy. Therefore, it is important to distinguish Kantian autonomy from other definitions of autonomy.

Although autonomy is a central value in Kantian ethics, it also occupies an important position in Mill's version of utilitarian liberalism,<sup>78</sup> and while Rousseau did not use the term 'autonomy' in his writings, he defined moral freedom as 'obedience to the law one has prescribed for himself'.<sup>79</sup> It will be shown in chapter two that Rousseau's concept of moral freedom as property of the will is similar to Kant's notion of autonomy. While Rousseau was concerned with the question of how moral freedom can be achieved and sustained by individuals given the presence of social dependency, Kant focused on the nature of morality and adhering to the supreme principle of morality. Kantian autonomy can also be distinguished from the conception of autonomy advanced by Mill in his work *On Liberty*.<sup>80</sup> Mill's work focuses on the significance of autonomy in relation to paternalism, while Kantian autonomy is used in this thesis with regards to its principle of universality.<sup>81</sup> It will be argued that Kantian autonomy is more suited to the protection of sexual autonomy because individuals are prohibited from acting on principles which cannot be universalised without contradiction. Any action which is at odds with the CI is morally wrong and lacks autonomy. A person is only autonomous if they are free to act on laws which they have given themselves. Consequently, an individual's autonomy is said to be violated

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<sup>76</sup> J. Christman, 'Constructing the Inner Citadel: Recent Work on the Concept of Autonomy' (1988) 99(1) *Ethics* 109, 114.

<sup>77</sup> *Ibid.*

<sup>78</sup> J. S. Mill, *On Liberty and Other Essays* (J. Gray ed, OUP 1998).

<sup>79</sup> J. Rousseau, *The Social Contract*, (first published 1762, Oxford Paperbacks 2008), 151.

<sup>80</sup> Mill in fact did not use the term 'autonomy' in his work.

<sup>81</sup> This will be explored in more detail in chapter two.

within a Kantian framework where her decision to engage in sexual activity has been a result of coercive pressure applied by the defendant.

According to Kant, individuals are autonomous when they are capable of acting according to law which they provide for themselves. However, Kant was not the first philosopher to suggest that individuals are capable of reason. Thomas Hobbes called reason the ‘scout’ for the desires,<sup>82</sup> while David Hume called reason ‘slave of the passions’.<sup>83</sup> While Hume is said to have reduced reason to nature, Kant aimed to divorce it from nature completely.<sup>84</sup> Kant opted to transform reason into a judge, ‘who compels the witnesses to reply to those questions which he himself thinks fit to propose’.<sup>85</sup> Kantian ethics requires that individuals treat each other with respect because they are human beings, capable of reason.<sup>86</sup>

According to Hume, liberty can only mean:

[A] power of acting or not acting, according to the determinations of the will; this is, if we choose to remain at rest, we may; if we choose to move, we also may.<sup>87</sup>

Kant, however, viewed all moral theories prior to his as failing to explain the categorical character of moral obligation. According to Kant, previous moral theories did not recognise individuals as autonomous and capable of legislating laws for themselves.<sup>88</sup>

Kantian autonomy differs from the philosophical writings of Hume and Hobbes in that Kant argues that morality cannot be based on purely empirical considerations, such as interests, desires and wants which individuals have at any given moment. For Kant, these factors are contingent and variable, and, therefore, they cannot form the basis of morality. According to the Kantian view, the utilitarian’s happiness principle:

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<sup>82</sup> T. Hobbes, *Leviathians* (first published 1651, Oxford Paperbacks 2008).

<sup>83</sup> D. Hume, *A Treatise of Human Nature*, vol 2 (first published 1738, Everyman’s Library 1911), 127.

<sup>84</sup> S. R. Letwin, *The Pursuit of Certainty* (CUP 1965), 53.

<sup>85</sup> I. Kant, *Critique of Pure Reason* (J. M. D Meiklejohn tr and V. Politis ed, Everyman 1993), xxvii.

<sup>86</sup> M. J. Sandel, *Justice: What’s the Right Thing to Do?* (Penguin Books 2010), 123.

<sup>87</sup> Hume (n83), 89.

<sup>88</sup> J. B. Schneewind, ‘Kant Against the Spurious Principles of Morality’ in J. Timmerman, *Kant’s Groundwork of the Metaphysics of Morals: A Critical Guide* (CUP 2009), 140-158.

[C]ontributes nothing whatever toward establishing morality, since making a man happy is different from making him good and making him prudent or astute in seeking his advantage quite different from making him various’<sup>89</sup>

Basing morality on interests and preferences destroys its dignity and does not allow individuals to distinguish between right and wrong.<sup>90</sup> It is important to determine the basis of morality in order to apply it to the protection of sexual autonomy. Kant contends that individuals can arrive at the supreme principle of morality through ‘pure practical reason’. Thus, when individuals act on reason they are not motivated by the desire to seek pleasure and avoid pain.<sup>91</sup> A Kantian framework underpins this thesis because the moral worth of an action stems from the intention from which the act is done.<sup>92</sup> Thus, if reason determines an individual’s will, then the will becomes the power to choose independent of the dictates of inclinations. It will be argued that Kant’s principle of universality is an effective method for the protection of sexual autonomy because it can be used as a test to determine when an individual places his interests above those of another. Where a defendant procures sexual activity by acting on his own interests and desires which he places before those of the complainant, then he cannot be said to be acting autonomously within a Kantian framework. If his actions cannot be universalised then he may not be acting autonomously and the complainant’s autonomy may be violated as a result of the defendant’s actions.

For the purposes of this thesis, Kantian autonomy is chosen over other forms of autonomy because it consists in the capacity of the will of a rational being which is able to formulate laws for itself, independent from the external influences and pressures. Kantian autonomy is an effective method for the protection of sexual autonomy because it involves:

[N]ot only a capacity for choice that is motivationally independent, but a law giving capacity that is independent of determination by external influence and is guided by its own internal principle.<sup>93</sup>

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<sup>89</sup> Kant, *Groundwork for the Metaphysics of Morals* (n4), 442.

<sup>90</sup> Ibid.

<sup>91</sup> Sandel (n86), 108.

<sup>92</sup> Kant, *Groundwork for the Metaphysics of Morals* (n4), 394.

<sup>93</sup> A. Reath *Agency and Autonomy* (OUP 2006), 121.



Kantian autonomy imposes an obligation to treat individuals ‘never simply as a means, but always at the same time as an end in themselves’.<sup>94</sup> Chapter two will develop the notion that Kantian autonomy places an emphasis on respecting the humanity of individuals and Kant’s supreme principle of morality prohibits individuals from placing their interests before those of others. Kant wrote that ‘the dignity of man consists precisely of in his capacity to make universal law, although only on condition of himself also subject to the law he makes’.<sup>95</sup> A defendant who procures sexual activity through deception or non-violent coercion places his own interests above those of the complainant and makes an exception for himself in that he is unlikely to agree to be the target of similar deception and coercive conduct. In such a scenario, the defendant is said to have violated the complainant’s autonomy within a Kantian framework. It is this test which is unique to Kant’s conception of autonomy.

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<sup>94</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 91.

<sup>95</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 96.

## **Chapter synopsis**

Chapter two will outline the theory behind Kantian autonomy in order to apply this concept to both the previous as well as the current law of sexual offences. This chapter will also highlight the importance of employing Kantian autonomy in relation to the protection of sexual autonomy.

Chapter three will examine the law of sexual offences prior to the current law. This chapter will determine whether the previous law of sexual offences adequately protected sexual autonomy. The function of chapter four will be to provide an outline of the origins of the current law and to determine whether the current law is consistent with Kantian autonomy.

Chapter five will discuss the application of Kantian autonomy in a practical context. This will involve an analysis of the barriers to the application of Kantian autonomy in a practical context. Chapter five will offer a re-interpretation of Kantian autonomy, which focuses on the essential elements of Kantian moral theory in relation to inclinations and respecting the dignity of others, with regards to the protection of sexual autonomy.

Chapter six will conclude by arguing that Kantian autonomy is an effective method for protecting sexual autonomy. This chapter will argue that a Kantian interpretation of the current law of sexual offences can provide more adequate protection in relation to sexual autonomy.

## Chapter Two: Kantian Autonomy

### Introduction

This chapter will provide a critical analysis of the various conceptions of autonomy in order to show that, unlike other notions of autonomy, Kantian autonomy is the most effective form of autonomy in relation to the protection of sexual autonomy. At the heart of Kantian autonomy is the duty owed to others as well as the individual's capacity to make decisions for oneself. It will be shown that Kantian autonomy can play an important role in the protection of sexual autonomy because it focuses on freedom and universalization. An autonomous individual, within a Kantian framework, is one who is not subject to the will of another. This is an important element in the protection of sexual autonomy especially in non-violent coercive circumstances. Kant's supreme principle of morality will be examined in order to determine whether it is capable of being applied in a practical context. The current law of sexual offences protects sexual autonomy by adopting a consent-centric model which consists of philosophical concepts such as 'freedom' and 'capacity', but fails to define them.

### Autonomy

Individual autonomy is an idea that is generally understood to represent the capacity to be one's own person and to lead a life according to reasons and motives that are taken as one's own, and not the product of manipulative external forces.<sup>96</sup> Autonomy is a central value in Kant's moral philosophy and is represented by the five formulae of the Categorical Imperative (CI).<sup>97</sup> Kantian autonomy focuses on the status of individuals as universal law givers rather than as universal law followers. To be autonomous for Kant is emphatically not to be able to do whatever an individual desires, but to have the capacity for rational self-governance. To be autonomous is to be a member of a kingdom of similar autonomous individuals and to treat others 'never simply as a means, but always at the same time as an

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<sup>96</sup> J. Christman, 'Autonomy in Moral and Political Philosophy', *The Stanford Encyclopedia of Philosophy* (2011) The Stanford Encyclopedia of Philosophy, E. N. Zalta ed  
<http://plato.stanford.edu/archives/spr2011/entries/autonomy-moral/> accessed 11 July 2013.

<sup>97</sup> H. J. Paton, *The Categorical Imperative* (University of Pennsylvania Press 1971), 129.

end’.<sup>98</sup> This conceptualisation is said to be at odds with the way in which the language is currently used in law.<sup>99</sup> Autonomy, nowadays, is associated with the satisfaction of individual desires and wishes.<sup>100</sup> The principle of autonomy holds that each individual is to be treated as responsible for her own behaviour.<sup>101</sup>

The reason why the thesis considers Kantian autonomy relevant to sexual offences is because it entails the unconditional capacity of rational individuals to control their will. Kantian autonomy is central to the concept of autonomy that occupies a prominent place in Western liberal thought.<sup>102</sup> Kant’s conception of autonomy is said to have marked a crucial step in the development of freedom as the ‘central value of our culture’.<sup>103</sup> The influence of Kantian autonomy can be seen, amongst other disciplines, in the fields of bioethics,<sup>104</sup> law<sup>105</sup> and political theory.<sup>106</sup>

For Kant, autonomy is the capacity to act on rational principles and to exercise moral reasoning through freedom of choice.<sup>107</sup> Since the Sex Offences Review (SOR) recommended that the definition of consent should be defined in law as ‘free agreement’,<sup>108</sup> the thesis will examine whether the current law of sexual offences has achieved the aims of the SOR. Anderson contends that sexual autonomy should be valued differently from other forms of freedom. He states that ‘a person’s sexuality almost always figures prominently as an aspect of his or her self-conception, status in society, and economic and social prospects’.<sup>109</sup>

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<sup>98</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 91.

<sup>99</sup> S. A. M. McLean, *Autonomy, Consent and the Law* (Routledge-Cavendish 2010), 15.

<sup>100</sup> Ibid.

<sup>101</sup> A. Ashworth and J. Horder, *Principles of Criminal Law* (7<sup>th</sup> edn, OUP 2013), 23.

<sup>102</sup> K. Treiger-Bar-Am, ‘In Defence of Autonomy: An Ethic of Care’ (2008) 3 NYU Journal of Law & Liberty 548, 549.

<sup>103</sup> C. Taylor, ‘Kant’s Theory of Freedom’ in Z. Pelczynski and J. Gray (eds), *Conception of Liberty in Political Philosophy* (Athlone 1984), 100.

<sup>104</sup> O. O’Neill, *Autonomy and Trust in Bioethics* (CUP 2002).

<sup>105</sup> McLean (n99), 16.

<sup>106</sup> Taylor (n103), 100.

<sup>107</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 101.

<sup>108</sup> Home Office *Setting the Boundaries* (n26).

<sup>109</sup> S. Anderson, ‘Prostitution and Sexual Autonomy: Making Sense of Prohibition and Prostitution’ in J. Spector (ed), *Prostitution and Pornography: Philosophical Debates About the Sex Industry* (SUP 2006), 386.

### Philosophical autonomy

The etymological roots of ‘autonomy’ are found in the two Greek words ‘auto’, meaning self, and ‘nomos’, which means rule or law.<sup>110</sup> The early modern ideology of political autonomy has been attributed to Machiavelli, who in the *Discourses* combined two senses of autonomy. The first is freedom from dependence, while the second concerns the power to self-legislate.<sup>111</sup> Therefore, for an agent to be autonomous, she must possess a developed self to which her actions can be ascribed. The other dimension of autonomy requires ‘freedom from external constraints’.<sup>112</sup> This suggests that for an individual to be autonomous she must not be manipulated by others or forced to do their will.<sup>113</sup> According to Lindley, ‘the underlying idea of the concept of autonomy is self-mastery’.<sup>114</sup> This implies that an individual must have mastery over herself and she must not be subservient to others.<sup>115</sup> The concept of autonomy is well expressed by Berlin in his essay *Two Concepts of Liberty*,<sup>116</sup> where he makes a distinction between negative and positive liberty. Positive liberty deals with who or what controls an individual’s life. Negative liberty, on the other hand, refers to non-interference by society in the life of the individual. According to Berlin:

[T]hose who have ever valued liberty for its own sake believed that to be free to choose, and not to be chosen for, is an inalienable ingredient in what makes human beings human; and that this underlies both the positive demand to have a voice in the laws and practices of the society in which one lives, and to be accorded an area, artificially carved out, if need be, in which one is one’s own master, a ‘negative’ area in which a man is not obliged to account for his activities to any man so far as this is compatible with the existence of organised society.<sup>117</sup>

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<sup>110</sup> Schulhofer (n13), 105.

<sup>111</sup> M. Wiberg, ‘Political Autonomy: Ambiguities and Clarifications’ in M. Suksi (ed), *Autonomy: Applications and Implications* (Brill 1989), 47.

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

<sup>114</sup> R. Lindley, *Autonomy* (Palgrave Macmillan 1986), 6.

<sup>115</sup> Ibid.

<sup>116</sup> I. Berlin, *Four Essay on Liberty*, (OUP 1969), 118-172.

<sup>117</sup> Ibid, ix.

This freedom is said to include freedom from unwanted interference, even if the interference is for the benefit of the person who suffers it.<sup>118</sup> Mill presented a similar argument to Berlin's in relation to protecting an individual from paternalism. Mill wrote:

[T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.<sup>119</sup>

Consequently, the only justification for coercively interfering with an individual is to prevent him from harming others.<sup>120</sup> Feinberg defines harm as 'those states of setback interests that are the consequence of wrongful acts or omissions of others'.<sup>121</sup> Sheleff notes that the harm principle, as being an expression of a morality that flows from individual autonomy, is a technical means of ensuring the moral values of individual autonomy.<sup>122</sup> Ashworth states that wrongfulness is an important element in relation to the harm principle.<sup>123</sup> He writes that:

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<sup>118</sup> T. Hope, J. Savulescu and J. Hendrick, *Medical Ethics and Law: The Core Curriculum* (2<sup>nd</sup> edn, Churchill Livingstone 2008), 41.

<sup>119</sup> J. S. Mill, *On Liberty and Other Essays* (J. Gray ed, OUP 1998).

<sup>120</sup> J. Raz, 'Autonomy, Toleration, the Harm Principle' in R. Gavinson (ed.), *Issue in Contemporary Legal Philosophy* (Clarendon Press 1989), 326.

<sup>121</sup> J. Feinberg, *The Moral Limits of the Criminal Law: Harm to Others*, vol 1 (OUP 1987), 215.

<sup>122</sup> L. Sheleff, 'Comment' in R. Gavinson (ed.), *Issue in Contemporary Legal Philosophy* (Clarendon Press 1989), 344-345.

<sup>123</sup> A. Ashworth, *Principles of Criminal Law* (6<sup>th</sup> edn, OUP 2009), 28.

It is not the causing of harm alone that justifies criminalization, but the wrongful causing of harm – wrongful in the sense of culpably assailing a person's interests, or abusing them by using them as a means to another's satisfaction.<sup>124</sup>

Gardner and Shute, on the other hand, argue that committing a wrong against another is the essence of most serious crimes, without the need to establish harm.<sup>125</sup> They believe that '[f]ocusing on the harms tends to occlude the wrongfulness of the act itself'.<sup>126</sup> They purport to establish what is wrongful about rape by focusing on a 'pure' case of rape, a case which is 'entirely stripped of distracting epiphenomena'.<sup>127</sup> The authors use the example of a non-consenting victim who is unconscious, who never discovers she was sexually penetrated, and experiences no (other) harm. They state that rape is wrong because a rapist 'objectifies his victim by treating her as a mere repository 'of use-value'.<sup>128</sup> Gardner and Shute adopt a Kantian argument to support their claim that 'rape, in the pure case, is the sheer use of a person'.<sup>129</sup> Regarding sexual autonomy, Gardner and Shute state that:

[S]ex industry workers typically are being objectified by their clients and consumers, and this is indeed an attack on their humanity. They are being used purely for sexual gratification.<sup>130</sup>

They contend that allowing people to pursue various sexual options is, up to a point, rehumanizing because it credits them with moral agency, without which credit their dehumanization is only compounded.<sup>131</sup> This rehumanizing value, combined with the general value of personal autonomy, gives rise to a right to sexual autonomy.<sup>132</sup> Therefore, rape is a wrong because it is a violation of this right.<sup>133</sup> In relation to autonomy, Feinberg states that:

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<sup>124</sup> Ibid, 29.

<sup>125</sup> J. Gardner and S. Shute, 'The Wrongness of Rape', in J. Gardner, *Offences and Defences: Selected Essay in the Philosophy of Criminal Law* (OUP 2007), 1-32.

<sup>126</sup> Ibid, 5.

<sup>127</sup> Ibid, 6.

<sup>128</sup> Ibid, 15.

<sup>129</sup> Ibid, 20.

<sup>130</sup> Ibid, 19.

<sup>131</sup> Ibid, 20.

<sup>132</sup> Ibid.

<sup>133</sup> Ibid.

[T]he most basic autonomy-right is the right to decide how to live one's life, in particular how to make the critical life decisions – what course of study to take, what skills and virtues to cultivate, what career to enter, who or whether to marry, which church if any to join, whether to have children, and so on.<sup>134</sup>

Therefore, an autonomous individual is said to be her own person, directed by considerations, desires, conditions, and characteristics that are not simply imposed externally upon her.<sup>135</sup> Raz argues that the autonomy-based doctrine of freedom consists of three main features:

First, its primary concern is the promotion and protection of positive freedom which is understood as the capacity for autonomy, consisting of the availability of an adequate range of options, and of the mental abilities necessary for an autonomous life. Second, the state has the duty not merely to prevent the denial of freedom, but also to promote it by creating the conditions of autonomy. Third, it may not pursue any goal by means which infringe people's autonomy unless such action is justified by the need to protect or promote the autonomy of those people or of others.<sup>136</sup>

Feinberg claims that there are at least four different meanings of 'autonomy' in moral and political philosophy: the capacity to govern oneself; the actual condition of self-governance; an ideal of character; and the sovereign authority to govern oneself. Central to all of these uses is a conception of the individual able to act, reflect, and choose on the basis of factors that are her own.<sup>137</sup>

Wiberg argues that an autonomous agent is one that is 'exempt from arbitrary control, uncoerced and unrestricted'.<sup>138</sup> He contends that autonomy does not require isolation from other individuals nor does it require that no external factors can have some sort of impact on the autonomous agent.<sup>139</sup> Instead, he suggests that autonomy should refer to self-direction rather than to self-sufficiency.<sup>140</sup> This argument follows a Kantian model of autonomy. The

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<sup>134</sup> Feinberg *The Moral Limits of the Criminal Law: Harm to Others* (n121), 54.

<sup>135</sup> Christman, *Constructing the Inner Citadel: Recent Work on the Concept of Autonomy* (n76).

<sup>136</sup> J. Raz, *The Morality of Freedom* (Oxford: Clarendon Press), 425.

<sup>137</sup> Christman, *Constructing the Inner Citadel: Recent Work on the Concept of Autonomy* (n76).

<sup>138</sup> Wiberg (n111), 44.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid.



opposite of autonomy is heteronomy; an individual is said to be heteronomous if her beliefs or desires or actions are not autonomous. Lindley offers the following conception which characterises ways of failing to be heteronomous:

An agent is cognitively heteronomous with respect to a particular belief or set of beliefs if either A holds that belief or set of beliefs on account of a failure of A's passive or active theoretical rationality, or the belief or set of beliefs is false...A is cognitively heteronomous with respect to a particular action or set of actions if either A acts through domination by lower-order desires, or A acts through weakness of will.<sup>141</sup>

Heteronomy, which can be either cognitive (belief) or conative (will),<sup>142</sup> is interference with self-determination either by other individuals or by internal psychic barriers interfering so that an individual is unable to decide for herself.<sup>143</sup>

### Personal autonomy

Modern philosophers distinguish between personal autonomy and moral autonomy.<sup>144</sup> According to Raz the ideal of personal autonomy:

[H]olds the free choice of goals and relations as an essential ingredient of individual well-being. The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.<sup>145</sup>

This ideal of personal autonomy is associated with other virtues such as self-awareness and integrity.<sup>146</sup> Both Feinberg's and Raz's concepts of autonomy are consistent with Kantian

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<sup>141</sup> Lindley (n114), 70.

<sup>142</sup> Wiberg (n111), 47.

<sup>143</sup> S. Darwall, 'The Value of Autonomy and Autonomy of the Will' [2006] *Ethics* 263, 264.

<sup>144</sup> D. Johnson, *The Idea of a Liberal Theory* (PUP 1994), 72-7.

<sup>145</sup> Raz, *The Morality of Freedom* (n136), 369.

<sup>146</sup> R. S. Taylor, 'Kantian Personal Autonomy' (2005) 33 *Political Theory*, 602, 605.

autonomy thereby illustrating that Kantian autonomy is not only an accepted concept of autonomy but is the framework on which other concepts of autonomy are based.

### Moral autonomy

Darwall distinguishes between personal autonomy and moral autonomy by stating that the former involves the individual ‘determining his conduct by his own most highly cherished values’,<sup>147</sup> while the latter involves an agent choosing in accordance with her own moral convictions or principles.<sup>148</sup> Waldron provides a similar definition of moral autonomy when he states that ‘moral autonomy...is associated specifically with the relation between one person’s pursuit of his own ends and others’ pursuit of theirs’.<sup>149</sup>

This definition appears to be consistent with Kantian autonomy. An individual is autonomous in the moral sense when she is not guided just by her own conception of happiness, but by a universalized concern for the ends of all rational individuals.<sup>150</sup> Kant distinguishes autonomy from heteronomy by stating that moralities, whose imperative force does not stem from an individual’s own will but is obtained ‘beyond’ itself, are ‘heteronomous’.<sup>151</sup>

Autonomy has been described as a spacious word, capable of containing a variety of philosophical implications.<sup>152</sup> This is demonstrated by the following philosophical definitions of autonomy:

- I am autonomous if I rule me, and no one else rules I.<sup>153</sup>
- To regard himself as autonomous...a person must see himself as sovereign in deciding to believe and in weighing competing reasons for action.<sup>154</sup>

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<sup>147</sup> Darwall (n143), 265.

<sup>148</sup> Ibid.

<sup>149</sup> J. Waldron, ‘Moral Autonomy and Personal Autonomy’ in J. Christman and J. Anderson (eds), *Autonomy and the Challenges to Liberalism* (CUP 2009), 307.

<sup>150</sup> Ibid.

<sup>151</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 102.

<sup>152</sup> D. A. Dripps, ‘Beyond Rape: An Essay on the Difference between the Presence of Force and the Absence of Consent’ (1992) 92 Columbia Law Review 1780, 1785.

<sup>153</sup> R. S. Peters, ‘Reason and Passion’ in R. F. Dearden et al (eds), *Education and the Development of Reason* (Routledge 1972), 161.

- As Kant argued, moral autonomy is a combination of freedom and responsibility; it is a submission to laws that one has made for oneself. The autonomous man, insofar as he is autonomous, is not subject to the will of another.<sup>155</sup>

The common element among these definitions is the emphasis on freedom for the individual, a central concept in Kantian autonomy. The concept of freedom includes freedom from interference by others. Autonomy comprises of positive and negative aspects.<sup>156</sup> The positive involves a person's right to decide when and with whom to engage in sexual activity, while the negative aspect involves the right to refuse relations with others and have effect given to that refusal.

Kantian autonomy is not only considered highly influential but has also generated endless commentary and critique.<sup>157</sup> Young notes that philosophers have construed individual autonomy as 'a character ideal or virtue'.<sup>158</sup> He states that such a construction is clearly linked to the Kantian tradition in which regulating one's own life is considered a virtue.<sup>159</sup> Within this Kantian approach reason is linked with autonomy as the most valuable means of controlling one's surroundings.<sup>160</sup> Advocates of this approach argue that being autonomous entails making choices based on critical reflection. Benn writes that an autonomous person must 'be capable of second thoughts in the light of new reason'.<sup>161</sup> Therefore, sexual autonomy within a Kantian framework occurs when a person can revise her choices when further evidence arises which suggest that her previous choices, regarding sexual activities, were poor. Beauchamp and Childress write that the traits of an autonomous person include 'capacities for self-governance such as understanding, reasoning, deliberating, managing, and

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<sup>154</sup> D. Pole, 'The Concept of R. F. Dearden *et al* (eds), *Education and the Development of Reason* (Routledge 1972), 130.

<sup>155</sup> R. P. Wolff, *In Defence of Anarchism* (Harper & Row 1970), 14.

<sup>156</sup> Elliott and de Than (n42), 231.

<sup>157</sup> McLean (n99), 15.

<sup>158</sup> R. Young, *Personal Autonomy: Beyond Negative and Positive Liberty* (Croom Helm Ltd 1986), 9.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*, 9-10.

<sup>161</sup> S. I. Benn, 'Freedom, Autonomy and the Concept of a *Person*' (1975) 76 *Proceedings of the Aristotelian Society* 109, 126.

independent choosing'.<sup>162</sup> However, this definition appears to focus on voluntariness rather than autonomy.<sup>163</sup>

### Legal autonomy

Schulhofer argues that respect for sexual autonomy requires sexual privacy against abuse and overreaching.<sup>164</sup> It also requires that the law protects the freedom of individuals to seek emotional intimacy and sexual fulfilment with willing partners.<sup>165</sup> Interference with sexual autonomy should be considered unacceptable and illegal whether that interference takes the form of threats, abuse of trust or exploitation of authority.<sup>166</sup> Hence, sexual autonomy is the right of an individual to freely choose the boundaries of her sexual life provided her choices do not interfere with the sexual autonomy of others. Schulhofer criticises reforms in sexual offences because:

None of these approaches recognizes (except rhetorically) that the central value to be protected is sexual autonomy itself, the freedom of every person to decide whether and when to engage in sexual relations.<sup>167</sup>

Sexual autonomy is limited by the rights of others and, as a result, it cannot entail the freedom to have sex whenever and with whomever an individual wants. Schulhofer argues that sexual autonomy has two facets:

The first is active – the right to decide on the kind of life one wishes to live and the kinds of activities one wishes to pursue, including activities with others who are willing. The other facet of sexual autonomy is the reverse – the right to safeguard and exclude, the freedom to refuse to have sex with any person at any time, for any reason or for no reason at all.<sup>168</sup>

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<sup>162</sup> T. L. Beauchamp and J. F. Childress, *Principles of Biomedical Ethics* (6<sup>th</sup> edn, OUP 2009), 100.

<sup>163</sup> Y. M. Barilan, 'Respect for Personal Autonomy, Human Dignity, and the Problems of Self-Directedness and Botched Autonomy', (2011) 36 *Journal of Medicine and Philosophy* 469, 497.

<sup>164</sup> Schulhofer (n13), 15.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*, 99.

<sup>168</sup> *Ibid.*

It is argued that a Kantian model displays these facets. The above description of sexual autonomy echoes Dripp's definition of what is meant by sexual autonomy, 'the freedom to refuse to have sex with anyone for any reason'.<sup>169</sup>

Kant argues that morality cannot be based on merely empirical<sup>170</sup> considerations such as interests, wants and preferences people have at any given time.<sup>171</sup> These factors are variable and contingent and therefore they cannot form the basis for universal moral principles.<sup>172</sup> Kant argues that 'it is impossible to reach an agreement on feelings, because feeling is by no means uniform'.<sup>173</sup> If desires were to be accepted as the determination of moral obligations, their contingent nature may cause variety in the rules.<sup>174</sup> An individual is described by Kant as having:

[T]wo points of view from which he can regard himself and from which he can know laws governing the employment of his powers and consequently governing all his actions. He can consider himself first – so far as he belongs to the sensible world – to be under laws of nature (heteronomy); and secondly – so far as he belongs to the intelligible world – to be under laws which being independent of nature, are not empirical but have their ground in reason alone.<sup>175</sup>

According to Kant, there are two perspectives concerning human agency. An individual who inhabits an intelligible world is independent of the laws of nature and as a result is capable of autonomy. She is capable of acting autonomously because she is competent to act according to a law she formulates for herself.<sup>176</sup> Only from this intelligible world can an individual regard herself as free, 'for to be independent of determination by causes in the sensible world (and this is what reason must always attribute to itself) is to be free'.<sup>177</sup> Therefore, if an individual were only an empirical being, she would not be capable of freedom because every

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<sup>169</sup> Dripps (n152), 1785.

<sup>170</sup> Based on actual experience, a *posteriori*.

<sup>171</sup> Sandel (n86), 107.

<sup>172</sup> Ibid.

<sup>173</sup> I. Kant, *Observations on the Feeling of the Beautiful and the Sublime* (P. Frierson and P. Guyer eds, P. Guyer tr, CUP 2011), 226.

<sup>174</sup> G. Ortiz-Millan, 'Kant on the Nature of Desires' in V. Rohden *et al. Recht und Frieden in der Philosophie Kants* (Walter de Gruyter 2008), 331.

<sup>175</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 113.

<sup>176</sup> Sandel (n86), 127.

<sup>177</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 113.

exercise of her will would be conditioned by some interest or inclination.<sup>178</sup> The choices she makes would be heteronomous choices governed by the pursuit of some end. The idea that individuals can act freely and take moral responsibility for their actions requires that they view themselves from the standpoint of an agent, not merely an object. This standpoint also allows individuals to hold others morally responsible for their actions.<sup>179</sup> However, Kant concedes that individuals do not only inhabit the intelligible world, but the sensible world as well.<sup>180</sup> If individuals were rational beings, not subject to the laws and necessities of nature, then all their actions ‘would invariably accord with the autonomy of the will’.<sup>181</sup> Categorical imperatives are possible because the idea of freedom makes an individual a member of the intelligible world.<sup>182</sup> Kant contrasts hypothetical imperatives (HI), which are always conditional, with a type of imperative that is unconditional: a categorical imperative. Kant writes:

If the action would be good solely as a means to something else, the imperative is hypothetical. If the action is represented as good in itself, and therefore as necessary for a will which of itself accords with reason, then the imperative is categorical.<sup>183</sup>

Because individuals, according to Kant, inhabit both standpoints,<sup>184</sup> there is always potentially a gap between what individuals do and what they ought to do, between the way things are and the way they ought to be.<sup>185</sup>

### **Kantian autonomy**

It has been shown in the previous sections that Kantian autonomy is not only a recognised concept but is a concept from which later definitions of autonomy are derived. It has also been shown that sexual autonomy is a concept that should be protected. An analysis of

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<sup>178</sup> Sandel (n86), 128.

<sup>179</sup> Ibid.

<sup>180</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 114.

<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

<sup>183</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 78.

<sup>184</sup> The realm of necessity and the realm of freedom.

<sup>185</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 114.

Kantian autonomy will also determine to what extent the current law of sexual offences is consistent with Kantian autonomy.

### Kantian morality

Kant is of the opinion that morality comprises a set of demands that are not only unconditionally valid but also valid for all rational beings.<sup>186</sup> Kant argued that moral obligations are based on a standard of rationality, which he termed the CI. It is an imperative because it is a command.<sup>187</sup> Hypothetical Imperatives use instrumental reason in the sense that if a person wants X, then he must do Y.<sup>188</sup> Kant states that:

[A]n imperative is concerned with the choice of means to one's own happiness – that is, a precept of prudence – still remains hypothetical: an action is commanded, not absolutely, but only as a means to a further purpose.<sup>189</sup>

A CI on the other hand commands without reference to or dependence on any further purpose. Kant asserts that a CI:

[I]s concerned, not with the matter of the action and its presumed results, but with its form and with the principle from which it follows; and what is essentially good in the action consists in the mental disposition, let the consequences be what they may.<sup>190</sup>

Accordingly, only a CI can qualify as an imperative of morality. Such an imperative is not concerned with the matter of the action nor its presumed results, but only with its form.<sup>191</sup> He asserts that:

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<sup>186</sup> A. Reath *Agency and Autonomy* (n83), 67.

<sup>187</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 77.

<sup>188</sup> Sandel (n86), 119.

<sup>189</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 80.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

There is therefore only a single categorical imperative and it is this: ‘Act only on that maxim through which you can at the same time will that it should become a universal law’.<sup>192</sup>

According to Kant, ‘I ought never to act except in such a way that I can also will that my maxim should become a universal law’.<sup>193</sup> By a ‘maxim’ Kant means a normative principle, which an agent lays down for herself with the intention of acting according to it.<sup>194</sup> In other words, it is a rule that gives reason to specific actions. Therefore, morality comprises a set of demands that are unconditional and valid for all rational beings.<sup>195</sup> Kant thought that to support this understanding of moral principles, an individual must show that they originate in reason a priori,<sup>196</sup> as opposed to originating in contingent facts concerning human psychology, or the circumstances of human life.<sup>197</sup> Since the HI is the principle underlying the empirically conditioned use of reason, it follows that the moral law cannot be derived from any concept of empirical practical reason.<sup>198</sup>

An imperative is expressed by an ‘ought’.<sup>199</sup> However, there are ‘oughts’ other than moral duties which are distinguished from the moral ‘ought’ because they are based on hypothetical imperatives. A HI can be described as a conditional command, which is ‘good for some purpose or other’.<sup>200</sup> An individual who engages in sexual activity due to heteronomous factors can be said to be acting contrary to Kantian autonomy. A CI, on the other hand, is an unconditional command, which is ‘objectively necessary in itself without reference to some purpose’.<sup>201</sup>

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<sup>192</sup> Ibid, 84.

<sup>193</sup> Ibid, 65.

<sup>194</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 84.

<sup>195</sup> Reath *Agency and Autonomy* (n93), 67.

<sup>196</sup> Known or formed independently of particular experience; non-empirical.

<sup>197</sup> Reath *Agency and Autonomy* (n93), 67.

<sup>198</sup> Ibid, 69.

<sup>199</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 77.

<sup>200</sup> Ibid, 78.

<sup>201</sup> Ibid. Chapter five will examine whether the CI can be achieved in a practical context.



## The Supreme Principle of Morality

Kant formulates the CI, the ‘supreme principle of morality’,<sup>202</sup> as a test of the universality of the principles on which individuals act. He argues that morality cannot be based on merely empirical considerations, such as interests, wants and desires.<sup>203</sup> These factors are variable and contingent and therefore are not capable of serving as the basis for universal moral principles.<sup>204</sup> Basing moral principles on preferences and desires ‘contributes nothing whatever towards establishing morality’.<sup>205</sup> As a result, individual wants and desires cannot form the basis of morality. According to Kant:

Everything in nature works in accordance with laws. Only a rational being has the power to act in accordance with his ideas of laws – that is, in accordance with principles – and so has he a will. Since reason is required in order to derive actions from laws, the will is nothing but practical reason.<sup>206</sup>

Therefore, the supreme principle of morality can be achieved through ‘pure practical reason’.<sup>207</sup> An important aspect of Kant’s claim is that morality must rest on the principle of autonomy.<sup>208</sup> The moral worth of an action consists in the intention from which the act is done and not in the consequences that stem from it. Kant states that:

A good will is not good because of what it effects or accomplishes – because of its fitness for attaining some proposed end: it is good through its willing alone – that is, good in itself.<sup>209</sup>

In order for any action to be morally good, ‘it is not enough that it should conform to the moral law – it must also be done for the sake of the moral law’.<sup>210</sup> Therefore, the motive for

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<sup>202</sup> Ibid, 57.

<sup>203</sup> Ibid, 103.

<sup>204</sup> Chapter five will examine whether this theory can be applied in a practical context.

<sup>205</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 103.

<sup>206</sup> Ibid, 76.

<sup>207</sup> Ibid.

<sup>208</sup> Reath *Agency and Autonomy* (n93), 72.

<sup>209</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 60.

<sup>210</sup> Ibid, 55-6.

carrying out an action should not be done for some ulterior motive, otherwise it would become a HI.<sup>211</sup> Kant writes that:

An action done from duty has its moral worth, not in the purpose to be attained by it, but in the maxim according with which it is decided upon; it depends therefore, not on the realisation of the object of the action, but solely on the principle of volition in accordance with which, irrespective of all objects of the faculty of desire, the action has been performed.<sup>212</sup>

Individuals who act out of motives other than duty, such as self-interest, are at risk of depriving their actions of moral worth. This is true not only for self-interest but for any attempts to satisfy ‘our wants, desires, preferences, and appetites’.<sup>213</sup> Kant insists that only actions carried out in response to the ‘motive of duty’ have moral worth.<sup>214</sup> Allison notes that central to Kant’s account of moral worth is the contrast between duty and inclination as two competing sources of motivation.<sup>215</sup> Kant defines ‘inclination’ as the ‘dependence of the power of appetite on sensation’ and thus ‘an inclination always indicates a need’.<sup>216</sup> Although Kant assumes a dualism of inclination and duty as the sources of motivation, ‘inclination’ must be interpreted in a broad sense to refer to any stimulus to actions that originates from ‘our sensuous, as opposed to our rational, nature’.<sup>217</sup> Inclinations include momentary desires, instincts, passions and fears, all of which pertain to sensuously affected beings.<sup>218</sup> It is important to note that Kant never claims that a morally praiseworthy act loses its moral significance if an individual has an inclination to perform it.<sup>219</sup> Kant claims that such an act lacks moral worth if the individual performs it only because of the inclination.<sup>220</sup>

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<sup>211</sup> Sandel (n86), 111.

<sup>212</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 65.

<sup>213</sup> Sandel (n86), 112.

<sup>214</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 63.

<sup>215</sup> H. E. Allison, *Kant’s theory of freedom* (CUP 1990), 108.

<sup>216</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 77.

<sup>217</sup> Allison (n215), 108.

<sup>218</sup> Ibid, 108-9.

<sup>219</sup> Ibid, 111.

<sup>220</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 118.

Therefore, moral worth does not require the absence of inclination, provided an individual's inclination was accompanied with the 'motive of duty'.<sup>221</sup>

Kant distinguishes between the motive for helping others – out of self-interest – and the motive of duty. Although the compassion of the altruist 'deserves praise and encouragement', its maxim lacks moral worth because the performance of such actions was carried out from inclination and not from duty.<sup>222</sup> In the Preface to the *Groundwork* Kant states that its purpose is 'nothing more than the search for the establishment of the supreme principle of morality'.<sup>223</sup> Kant holds that moral questions are to be decided by reason, which seeks unity under principles.<sup>224</sup> Kant does not consider reason to merely be the slave of the passions. If that were the case, individuals would be better served by relying on instinct.<sup>225</sup> Pure practical reason 'legislates a priori, regardless of all empirical ends'.<sup>226</sup>

Wood states that the function of the supreme principle of morality is:

[N]ot to tell us directly, from day to day and minute to minute, through some uniform canonical process of moral reasoning to be applied in exactly the same way to all situations, exactly what actions should (and should not) be performing and precisely how we should be spending our time.<sup>227</sup>

The correct interpretation of Kant's formulation of the supreme principle of morality should focus on identifying perspicuously the ultimate value on which moral rules and duties may be grounded.<sup>228</sup>

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<sup>221</sup> Ibid, 63.

<sup>222</sup> Ibid, 64.

<sup>223</sup> Ibid, 57.

<sup>224</sup> I. Kant, *Critique of Pure Reason* (J. M. D Meiklejohn tr and V. Politis ed, Everyman 1993), 236.

<sup>225</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 61.

<sup>226</sup> I. Kant, 'On the Common Saying, This May be True in Theory, But it Does not Apply in Practice' in R. Hans (ed) and H. B. Nisbet, (trans), *Kant's Political Writings* (CUP 1970), 73.

<sup>227</sup> A. W. Wood, 'The Supreme Principle of Morality' in P. Guyer (ed), *The Cambridge Companion to Kant and Modern Philosophy* (CUP 2006), 346.

<sup>228</sup> Ibid.

### The first formula of the Categorical Imperative

In his First formula, Kant writes that:

The will is absolutely good if it cannot be evil – that is, if its maxim when made into universal law, can never be in conflict with itself. This principle is therefore also its supreme law: ‘Act always on that maxim whose universality as a law you can at the same time will’.<sup>229</sup>

When individuals act from duty the only thing left that could motivate them is the purely rational appeal of a universally valid practical principle.<sup>230</sup> This leads Kant to his first formulation of the CI.<sup>231</sup> Kant’s theory assumes individuals to be self-directing in the sense that they possess the capacity to step back from their natural desires, reflect on them, consider whether and how they should satisfy them, and be moved by them only on the basis of such reflection.<sup>232</sup> By acting on inclinations, on the other hand, individuals make a series of decisions and create a set of new desires whose source is not merely the original desire they sought to satisfy.<sup>233</sup> Therefore, when an action would be good solely as a means to something else, it becomes a HI.<sup>234</sup> Kant contends that if the good will that acts from duty has the characteristic that it follows a rational principle even when all empirical incentives oppose it, then such a will should be understood as following a CI.<sup>235</sup> Only a CI can qualify as an imperative of morality.<sup>236</sup> Consequently, if acting from duty is what is essential to morality, then the supreme principle of morality must be conceived as a CI. To be free, in the sense of Kantian autonomy, requires individuals to act out of a CI rather than a HI.<sup>237</sup> Although Kant provides five formulations of the CI, he tends to speak as if there are only three.<sup>238</sup> Kant’s first formulation of the principle of morality specifies the form of the moral law and consists of two variants:

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<sup>229</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 98.

<sup>230</sup> Wood (n227), 348.

<sup>231</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 67.

<sup>232</sup> Wood (n227), 348.

<sup>233</sup> Ibid, 349.

<sup>234</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 78.

<sup>235</sup> Wood (n209), 349.

<sup>236</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 80.

<sup>237</sup> Sandel (n86), 119.

<sup>238</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 98.

Act only on that maxim through which you can at the same time will that it should become a universal law.<sup>239</sup>

Act as if the maxim of your action were to become through your will a universal law of nature.<sup>240</sup>

The former is referred to as the Formula of the Universal Law (FUL), while the latter is called the Formula of the Law of Nature (FLN).<sup>241</sup> When Kant speaks of ‘the categorical imperative’ and contends that there is only one, he has in mind the principle of all categorical imperatives.<sup>242</sup> The CI, unlike the HI, must be applied independently of any particular desires for a particular end.<sup>243</sup> Paton argues that on Kant’s view, to act on maxims that cannot be universalised is to act wrongly.<sup>244</sup> Therefore, acquiring sexual intercourse through maxims that cannot be universalised risks undermining sexual autonomy within a Kantian framework.

The FUL provides a test for permissibility of maxims by stating that it is permissible to act only on those maxims which can be willed to be universal laws. The term ‘universal law’ appears to be a normative force, in the sense that the question an individual asks about her maxim is whether she could will that everyone should be permitted to act on it. In relation to whether the maxim of making a false promise accords with duty, Kant’s answer begins by asking whether such a maxim is capable of being universalised:

Should I really be content that my maxim (the maxim of getting out of a difficulty by a false promise) should hold as a universal law (one valid for myself and others)? And could I really say to myself that every one may make a false promise if he finds himself in a difficulty from which he can extricate himself in no other way?<sup>245</sup>

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<sup>239</sup> Ibid, 84.

<sup>240</sup> Ibid.

<sup>241</sup> Paton (n97), 129.

<sup>242</sup> Ibid, 134.

<sup>243</sup> Ibid.

<sup>244</sup> Ibid, 141.

<sup>245</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 68.

He concludes that:

I then become aware at once that I can indeed will to lie, but I can by no means will a universal law of lying: for by such a law there could properly be no promise at all, since it would be futile to profess a will for future action to others who would not believe my profession or who, if they did so over-hastily, would pay me back in like coin; and consequently my maxim, as soon as it was made a universal law, would be bound to annul itself.<sup>246</sup>

The FUL allows individuals to consider which maxims they can will to be morally permissible for all while at the same time commanding them to restrict themselves only to those maxims which can be universalised. This can assist in identifying maxims which violate sexual autonomy.

### *Deception*

In relation to procuring sexual activity through deception, Herring contends that the offence of rape should be extended to cover situations where the complainant is caused to consent to intercourse by the defendant's deception.<sup>247</sup> To support the claim that deceit negates consent, Herring contends that deceit, like violence, manipulates people into acting against their will.<sup>248</sup> Herring's approach has been criticised on the basis that his argument merely represents a moral harm not serious enough to warrant criminalisation.<sup>249</sup> The risk of over-extending the scope of the criminal law is that adulterers and bigamists could face prosecution for rape.

Kant provides a variation of the first formula whereby individuals ask themselves which maxims they can will to be actually followed as universal laws of nature rather than asking which maxims they can will to be universally permissible. This variant of the FUL is referred to as the FLN. It is used by Kant to illustrate his first formula of the CI with reference to four examples organised according to the taxonomy of duties, through which he structures his

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<sup>246</sup> Ibid.

<sup>247</sup> Herring, 'Mistaken Sex' (n11), 511.

<sup>248</sup> Ibid.

<sup>249</sup> H. Gross, 'Rape, Moralism and Human Rights' [2007] Crim LR 224.

moral theory.<sup>250</sup> The FLN requires that an individual's maxim must be examined in order to determine whether an individual is acting within a Kantian framework. Thus, A performs action B in circumstances C in order to bring about end D. The second step is to generalise the maxim so that it applies to all rational beings so that they perform action B in circumstances C to bring about end D. The third step is to transform the generalised maxim into a law of nature so that everyone performs action B in circumstances C in order to bring about end D. The final step is to place the hypothetical law of nature to the existing laws of nature in order to determine what the system of nature would be. The target maxim is only permissible when A can will the resulting system of nature. The intent of the FUL, in asking whether a maxim is one which a person can at the same time will as a universal law, should be construed as the way of determining whether a person is acting from reasons which anyone can accept.<sup>251</sup>

Kant's example of using the FLN to illustrate that false promises are impermissible<sup>252</sup> can be extended to determine whether the maxim of obtaining sexual intercourse by deception is permissible and whether it can be universalised. Generalising the maxim so that it applies to all rational individuals will provide the following: A decides he is to have sexual intercourse and deceives another individual in order to procure sexual intercourse. It would not be possible to conjoin this hypothetical law of nature to the existing laws of nature. Kant argues a maxim involving deception is impermissible on the grounds that:

[T]he universality of a law that everyone believing himself to be in need can make any promise he pleases with the intention not to keep it would make promising, and the very purpose of promising, itself impossible, since no one would believe he was being promised anything, but would laugh at utterances of this kind as empty shams.<sup>253</sup>

Conjoining the hypothetical law with the existing laws of nature would result in promises not being believed. Individuals cannot coherently will that there should be such a system of nature, and therefore, the maxim of using deception to procure sexual intercourse is

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<sup>250</sup> Discussed in chapter one.

<sup>251</sup> Reath, *Agency and Autonomy* (n93), 74.

<sup>252</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 85.

<sup>253</sup> Ibid.

impermissible. A maxim that hinders the decision-making process of a complainant and manipulates her rational capacities, fails to respect the sovereignty of a complainant over her own decisions and choices.

#### The second formula: humanity as an end in itself

Kant's second formula states:

Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.<sup>254</sup>

By 'humanity', Kant means the power of free rational choice, for 'the capacity to propose an end to oneself is the characteristic of humanity'. The Formula of Humanity (FH) requires that we treat humanity as an end and never merely as a means in order to achieve respect for the dignity of humanity. Kant describes an 'end' as an object of free choice.<sup>255</sup> The words 'at the same time' and 'simply'<sup>256</sup> must not be overlooked when analysing the meaning of this formula. The FH does not forbid individuals from using others as a means. For example, every time a person borrows a library book, he is using the librarian as a means, but he does not use the librarian simply as a means. What he expects from the librarian is in accordance with his duty and his own will. What is forbidden by the FH is failing to treat a person 'at the same time as an end'. This implies that the injunction to treat individuals 'never merely as a means' is redundant. In order to comply with the FH, a person must treat others as ends. What Kant has in mind when he instructs that a person must never use herself or others 'simply as a means', is that they must not be used as means to the attainment of ends based on inclinations or to the satisfaction of inclinations.<sup>257</sup>

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<sup>254</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 91.

<sup>255</sup> I. Kant, *The Metaphysics of Morals* (M. Gregor tr, CUP 1991), 189.

<sup>256</sup> Ibid.

<sup>257</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 98.



Using another individual as a mere means requires an individual to act on a maxim that another cannot adopt.<sup>258</sup> Kant states that:

The will is thought of as a capacity to determine itself to acting in conformity with the representation of certain laws. And such a capacity can be found only in rational beings. Now what serves the will as the objective ground of its self-determination is an end.<sup>259</sup>

This suggests that individuals should have the capacity to select ends viewed as worthy of choice.<sup>260</sup> Similar to the first and second formulae is a supreme practical principle from which all other laws of the will may be derived.<sup>261</sup> This principle distinguishes between perfect and imperfect duties.<sup>262</sup> This principle negatively prohibits a person from using rational beings simply as a means and thereby overriding the rational wills of moral agents in order to satisfy her own inclinations.<sup>263</sup> This is the foundation of perfect duties and it forbids such wrongs as murder, violence, fraud and lying. It lies at the centre of Kant's philosophy of legal obligation. The principle can also be taken positively in the sense that it instructs an individual to act on the maxim which involves furthering the ends of other rational agents. Applying Kant's philosophy to the protection of sexual autonomy requires individuals to refrain from actions that violate another's sexual autonomy by fraud, coercion and any other method which undermines a person's capacity to decide on whether to agree to sexual activity. Individuals are also required to promote the ends of others and this includes refraining from actions which undermine sexual autonomy.

Paton writes that the 'setting of ends before oneself is the essential mark of freedom'.<sup>264</sup> He further adds that:

By force or threats I can be compelled to actions which are directed as means to certain ends; but I can never be compelled by others to make anything my end.<sup>265</sup>

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<sup>258</sup> O. O'Neill, *Construction of Reason: Explorations of Kant's Practical Philosophy* (CUP 1990), 138.

<sup>259</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 36.

<sup>260</sup> Reath *Agency and Autonomy* (n168), 80.

<sup>261</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 91.

<sup>262</sup> Paton (n97), 171.

<sup>263</sup> Ibid.

<sup>264</sup> Paton (n97), 181.

Where an individual decides on an end, she can only do so of her own free will. In enjoining the pursuit of ends the second formula implicitly asserts the autonomy of the will in making the laws which it must obey.<sup>266</sup> According to Kantian philosophy, there are two types of ends to be produced which the supreme principle of morality requires us to set: personal perfection and the happiness of others.<sup>267</sup> Kant applies the FH to the hypothetical case of extracting money from others by false pretences. The false promisor, Kant writes:

[I]s intending to make use of another man merely as a means to an end he does not share. For the man whom I seek to use for my own purposes by such a promise cannot possibly agree with my way of behaving to him, and so cannot himself share the end of the action.<sup>268</sup>

He states that this is more obvious in crimes of violence:

This incompatibility with the principle of duty to others leaps to the eye more obviously when we bring in examples of attempts on the freedom and property of others.<sup>269</sup>

Therefore, procuring sexual intercourse by coercion or fraud fails to respect the dignity of the complainant. It would fail as a universal law of nature because it cannot be willed that every individual can employ coercive methods in order to procure sexual intercourse. It would not be possible to will such a law unless every defendant was also willing to be coerced. The acts of coercion and manipulation require using an individual as a means to satisfy the defendant's sexual inclinations. The defendant in such situations does not treat the complainant as an end and he fails to respect her humanity as an end in itself.

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<sup>265</sup> Ibid.

<sup>266</sup> Ibid.

<sup>267</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 92.

<sup>268</sup> Ibid.

<sup>269</sup> Ibid.

### The third formula: autonomy and the kingdom of ends

Kant writes that:

[T]here now follows our third practical principle for the will – as the supreme condition of the will's conformity with universal practical reason – namely, the Idea of the will of every rational being as a will which makes universal law.<sup>270</sup>

The third formula has two variants:

[T]he Idea of the will of every rational being as a will which makes universal law.<sup>271</sup>

Act on the maxims of a member who makes universal laws for a merely possible kingdom of ends.<sup>272</sup>

This formula is based on the principle that a rational will makes, or provides for itself, the laws which it obeys. This is the Kantian principle of autonomy, which is the source of the unconditional worth, which belongs to moral agents as making laws, not merely obeying them.<sup>273</sup> According to Kant, the dignity of a person consists of his capacity to make universal law. This is conditional on the fact that she is herself also subject to the law, which she makes.<sup>274</sup>

Both variants can be treated as merely different ways of expressing 'precisely the same law'.<sup>275</sup> Kant proceeds by combining the two formulas to derive the Formula of Autonomy (FA).<sup>276</sup> The third formula combines the conception of a universal law valid for all rational beings<sup>277</sup> with the conception of every rational nature as having absolute worth to yield the idea of the will of every rational being as the legislator or source of a universally valid law. The FA directs individuals to positively follow those maxims which contain in themselves the volition that they should be universal laws.

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<sup>270</sup> Ibid, 93.

<sup>271</sup> Ibid, 96. This is the Formula of Autonomy.

<sup>272</sup> Ibid, 100. This is the Formula of the Kingdom of Ends.

<sup>273</sup> Ibid, 101.

<sup>274</sup> Ibid.

<sup>275</sup> Ibid, 97.

<sup>276</sup> Ibid, 93.

<sup>277</sup> Formula of Universal Law.

Kant writes that the moral law is a law that the rational person legislates.<sup>278</sup> This argument first appears with the introduction to the FA; the central idea is that of ‘the will of every rational being as a will which makes universal law’.<sup>279</sup> All maxims according to the principle of humanity:

[A]re repudiated which cannot accord with the will’s own enactment of universal law. The will is therefore not merely subject to the law, but is so subject that it must be considered as also making for itself and precisely on this account at first of all subject to the law (of which it can regard itself as the author).<sup>280</sup>

Therefore, Kant refers to rational will as legislating laws for itself and as the ‘author’ of the laws to which it is subject and as bound only to its own legislation.<sup>281</sup> Autonomy of the will is defined as ‘the property of the will has of being a law to itself (independently of every property belonging to the object of volition)’.<sup>282</sup> Therefore, the law that the autonomous will provides for itself is the moral law.<sup>283</sup>

Wood highlights the importance of the FA by arguing that:

It is only the FA that Kant ever explicitly claims that it unites the other two in itself; no such claim is ever made about the FUL or FH. Consequently, I think we should regard FA as having a special status among the three formulas: FA is the formula that unites and sums up the others. It should be regarded as the definitive formulation of the principle of morality, in so far as there is one.<sup>284</sup>

Kant provides a link between autonomy, morality and practical reason by stating that:

[T]he sole principle of morality consists in independence from all matter of the law...and at the same time in the determination of choice through the mere form of giving universal law that a maxim must be capable of. That independence, however,

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<sup>278</sup> Reath, *Agency and Autonomy* (n93), 92.

<sup>279</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 93.

<sup>280</sup> Ibid.

<sup>281</sup> Reath, *Agency and Autonomy* (n93), 92.

<sup>282</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 101.

<sup>283</sup> Reath, *Agency and Autonomy* (n93), 92.

<sup>284</sup> Wood (n227), 356.

is freedom in the negative sense whereas this law-giving of its own on the part of pure and, as such, practical reason is freedom in the positive sense. Thus the moral law expresses nothing other than the autonomy of pure practical reason.<sup>285</sup>

O'Neill claims that Kantian autonomy is not a matter of action that expresses individual decision. She argues that the basic idea, without which Kantian autonomy would collapse into heteronomy, is that autonomous principles are not derived elsewhere.<sup>286</sup> This illustrates that an autonomous agent must not be affected by the actions of another.

Kant provides a second variant of the FA which is the Formula of the Kingdom of Ends (FKE).<sup>287</sup> In the FKE, Kant writes that these laws would be the laws of a merely possible kingdom of ends. He defines a 'kingdom' as 'a systematic union of different rational beings under common laws'.<sup>288</sup> This definition makes explicit the social dimension of Kant's conception of autonomy.<sup>289</sup> Rational beings constitute a kingdom to the extent that their ends comprise a system. In order to conceive such a system, the ends of all rational beings must be mutually compatible and they must constitute a system of shared ends. These ends are not only rational agents as ends in themselves, but are also the personal or individual ends, which each person may set before herself.<sup>290</sup> Individuals act as law-giving members of a kingdom of ends and the actions of the rational agents cannot be determined by personal differences or private ends as such. However, the kingdom of ends is concerned with private ends only so far as they are compatible with universal law.<sup>291</sup> The FKE requires that individuals exclude ends that cannot be universalised, such as those that violate sexual autonomy. The effect of universal adherence to the laws of a kingdom of ends would result in advancing the ends of all rational beings in a single teleological system.<sup>292</sup> The FKE expands on what is implicit in applying the FH. It requires that individuals exclude ends that could not be universalised or

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<sup>285</sup> I. Kant, *Critique of Practical Reason* (L. W. Beck tr, 3<sup>rd</sup> edn, MacMillan 1993), 33-4.

<sup>286</sup> O. O'Neill, 'Self-legislation, Autonomy and the Form of Law' (2005) < <http://www.iep.utm.edu/autonomy/> > accessed 23 July 2013.

<sup>287</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 100.

<sup>288</sup> Ibid, 95.

<sup>289</sup> Reath, *Agency and Autonomy* (n93), 175.

<sup>290</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 93.

<sup>291</sup> Paton (n97), 187.

<sup>292</sup> Ibid.

shared between other rational beings (for example false promises) and that individuals further ends that unite rational beings (such as providing mutual aid).

The FA focuses on individuals being the potential legislators of laws valid for all rational beings. In legislating law, an individual is bound to it not because of any external incentives, but by the very reasons she recognised in legislating her law. It follows that, if no sanctions were imposed, she would still have reason to obey this law by virtue of her being the legislator. According to Kant, autonomy is the ‘ground for the dignity of human nature and of every rational nature’.<sup>293</sup> Thus, the FA makes it explicit; the value of humanity is its dignity.

Kant claims that the three formulae, which represent the principle of morality, are ‘formulations of precisely the same law’<sup>294</sup>; they differ only in representing different aspects of the same principle.<sup>295</sup> Kantian autonomy involves the capacity to reason and act independently of inclinations. It also requires freedom from subjection to external authority in the use of an individual’s reason.<sup>296</sup>

### **‘Capacity’ and ‘choice’ in Kantian autonomy**

Kant writes that ‘[o]nly a rational being has the capacity to act in accordance with the representation of laws, that is, in accordance with principles, or has a will’.<sup>297</sup> He defines the will as ‘a capacity to choose only that which reason independently of inclination cognizes as practically necessary, that is, as good’.<sup>298</sup> Therefore, a rational agent’s capacity must be free from heteronomous principles. The heteronomous principles articulated by Kant stem from inclination rather than from reason and give rise to a HI.<sup>299</sup>

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<sup>293</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 97.

<sup>294</sup> Ibid.

<sup>295</sup> Ibid.

<sup>296</sup> Reath, *Agency and Autonomy* (n93), 175.

<sup>297</sup> Kant, *The Metaphysics of Morals* (n255), 24.

<sup>298</sup> Ibid.

<sup>299</sup> Treiger-Bar-Am (n102), 565-66.

The term ‘humanity’ used in the second formula refers to the:

[C]apacity for autonomous choice, and it includes the capacity to act from one’s own judgment of what one has reason to do, to set ends for oneself, and to guide one’s actions by values one finds it reasonable to accept.<sup>300</sup>

Kantian autonomy has been described as a capacity for self-determination and self-governance that includes the capacity to form judgments.<sup>301</sup> Kant’s suggestion to treat others as ends and never merely as means, requires an individual to respect others as autonomous self-governing agents so they are able to act from principles that others can freely endorse, in their capacity as autonomous agents, and that justify an individual’s actions to them.<sup>302</sup>

### **Importance of Kantian autonomy**

Reath argues that the requirement of justifiability to others as autonomous agents leads to requirements to avoid ‘gratuitous injury, coercion, deception and fraud, manipulation, exploitation and profiting from the weaker position of others, and so on’.<sup>303</sup> If an employer decides to procure sexual intercourse from an employee through non-violent coercion, he can be said to be acting on inclinations and therefore acting out of self-interest, while at the same time he is using the employee merely as a means. As an autonomous individual, it is highly unlikely that she will endorse the employer’s actions because they hinder her capacity for self-determination and self-governance. The employer’s actions would violate her sexual autonomy by infringing on her capacity for self-determination. The employer, by adopting the maxim of resorting to non-violent coercion to obtain sexual intercourse, is likely to make an exception for himself in the sense that he is not willing to have his sexual autonomy violated by non-coercive conduct. Reath states that:

[T]he ideal of justifiability to others grounds positive duties such as beneficence and mutual aid, gratitude, loyalty, special obligations between loved ones and

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<sup>300</sup> A. Reath, ‘Contemporary Kantian Ethics’ in J. Skorupski, (ed), *The Routledge Companion to Ethics* (Routledge Press 2010), 456.

<sup>301</sup> Ibid, 457.

<sup>302</sup> Ibid.

<sup>303</sup> Ibid, 460.

friends, and so on, because such principles are among the social and material conditions needed to support the exercise of rational agency in socially interdependent beings.<sup>304</sup>

The requirement of treating individuals never simply as a means but always as an end allows for the respect for individuals as equal, autonomous agents and therefore can assist in determining when sexual autonomy has been violated.

Kantian autonomy is ‘the ground of the dignity of human nature and of every rational nature’.<sup>305</sup> The dignity of humanity consists of the capacity to legislate universal law on the condition that the individual is also subject to the law he legislates.<sup>306</sup> Agents with capacity for self-legislation should be treated in ways that they can accept, while at the same time they can maintain their autonomy. Therefore, autonomous agents should be treated in such a way that they are free from subjection to any external authority that hinders their capacity to self-legislate and their choices in relation to sexual activity. This illustrates the importance of using a Kantian model in relation to the protection of sexual autonomy.

Kant highlights the relationship between the concept of freedom and the CI when he writes that:

The proposition ‘Will is in all its actions a law to itself’ expresses, however, only the principle of acting on no maxim other than the one which can have for its object itself as at the same time a universal law. This is precisely the formula of the categorical imperative and the principle of morality. Thus, a free will and a will under the moral law are one and the same.<sup>307</sup>

According to Kant, the importance of the FUL lies in the fact that it is the principle of free will.<sup>308</sup> Reath articulates the relationship between Kantian autonomy and freedom when he notes that it is ‘in virtue of possessing autonomy that a rational will has a causal capacity that

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<sup>304</sup> Reath, ‘Contemporary Kantian Ethics’ (n300), 460.

<sup>305</sup> Kant *The Metaphysics of Morals* (n255), 97.

<sup>306</sup> Ibid, 101.

<sup>307</sup> Ibid, 108.

<sup>308</sup> Reath, *Agency and Autonomy* (n93), 115.



satisfies the concept of freedom'.<sup>309</sup> A free will has the capacity to initiate its own actions, independently of external constraints; 'it is in some fashion a self-originating cause of action'.<sup>310</sup> Kant's definition of freedom is 'Will is a kind of causality belonging to living beings so far as they are rational'.<sup>311</sup> This 'freedom' is then said to be 'the property this causality has of being able to work independently of determination by alien causes'.<sup>312</sup> This definition of freedom is 'negative' because it indicates the types of determinations that such a will is free from.<sup>313</sup>

Kant provides a link between autonomy and freedom when he asks 'What else then can freedom of will be but autonomy – that is, the property which will has of being a law to itself?'.<sup>314</sup> Therefore, freedom of the will requires a capacity for choice that is motivationally independent and a law-giving capacity that is independent of determination by external influence. Freedom of the will also requires that it should be guided by its own internal principle. This principle is Kant's FA, which is the principle of acting 'from principles through whose adoption one can regard oneself as giving law'.<sup>315</sup> Autonomy, as defined by Kant, involves independence in decision-making, requiring independence from heteronomous factors.<sup>316</sup> Kant regards this as negative autonomy.<sup>317</sup> Kantian autonomy in the positive sense is the capacity to self-legislate.<sup>318</sup> While autonomy requires both positive and negative freedom, autonomy is essentially the freedom of the will.<sup>319</sup> Therefore, individuals must be able to exercise their free will in relation to sexual activities.

Kantian autonomy requires individuals to respect the rights and obligations of others. These obligations include respecting the dignity of others. This can be seen in Kant's illustrations found in the FH concerning the duty to further the ends of others in order to bring the

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<sup>309</sup> Ibid, 153.

<sup>310</sup> Ibid.

<sup>311</sup> Kant, *The Metaphysics of Morals* (n255), 107.

<sup>312</sup> Ibid.

<sup>313</sup> Ibid, 153.

<sup>314</sup> Ibid, 107.

<sup>315</sup> Ibid, 155.

<sup>316</sup> Kant, *Critique of Pure Reason* (224), 377.

<sup>317</sup> Treiger-Bar-Am (n102), 560.

<sup>318</sup> Ibid.

<sup>319</sup> Treiger-Bar-Am (n102), 564.

legislating individual's actions into harmony with 'humanity as an end in itself'.<sup>320</sup> Acting morally requires acting out of duty for the sake of the moral law, which consists of the CI.

### **Kantian Autonomy: A Feminist Critique**

This section will address feminist criticism relating to Kantian autonomy. It will be suggested that Kantian autonomy addresses the primary feminist concerns relating to autonomy, and is an effective framework for the protection of sexual autonomy.

Kant uses prostitution and concubinage to illustrate the fact that sexual objectification has a negative impact on a person's humanity. Shrage contends that some feminist philosophers argue that pornography violates the moral imperative to treat individuals as autonomous, rational subjects.<sup>321</sup> According to Assiter, in pornography women 'become objects for another'.<sup>322</sup> To treat an individual simply as a means for another's use, without respect for her humanity, is to treat someone as an object, resulting in a violation of her sexual autonomy. Sedgwick criticises Kant's conception of autonomy on the basis that:

Because moral agency on his view is a function of acting from reason rather than from feeling, it is said to reflect features more of male than of female identity. Autonomy on the Kantian model seems to be something achieved not in the course of cultivating our relationships, but rather in weakening their hold.<sup>323</sup>

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<sup>320</sup> Paton (n97), 92.

<sup>321</sup> L. Shrage, 'Feminist Perspectives on Sex Markets' (2012) *The Stanford Encyclopedia of Philosophy*, E. N. Zalta (ed) <http://plato.stanford.edu/entries/feminist-sex-markets/> accessed 26 July 2013.

<sup>322</sup> A. Assiter, 'Autonomy and Pornography' in M. Griffiths and M. Whitford (eds), *Feminist Perspectives in Philosophy* (Indiana University Press 1988), 65.

<sup>323</sup> S. Sedgwick, 'Can Kant's Ethics Survive the Feminist Critique' in R. M. Schott (ed), *Feminist Interpretations of Immanuel Kant* (Pennsylvania State University Press 1997), 78.

Therefore, Kantian autonomy has become associated with a:

[M]oral superstar alone on a rock of rational will power, removed from the individuals whose this will requires him (Kant's hero is clearly conceived as male by Kant himself) to respect, relying on himself, with no "taint" of love or emotion spoiling his moral glory.<sup>324</sup>

This criticism is aimed at Kant's view that an individual should be able to stand alone and be independent of determination of 'alien causes' and possessing a will that is a 'law to itself'.<sup>325</sup> Kant's moral individual is said to be devoid of compassion but committed to principles and the duties that stem therefrom.<sup>326</sup> This depiction of the autonomous individual is unappealing to feminists who see an important place for care and sympathy in the nature of moral character.<sup>327</sup> Kantian autonomy is often viewed by feminists to be a thoroughly masculinist ideal on the basis that it is premised on an 'abstract individualism that portrays the paradigm moral agent as isolated, nonsensical, and ahistorical'.<sup>328</sup> Kneller suggests that:

What is needed is an account of autonomy that is not predicated on an isolationist individualism, and that recognises the importance of the individual being situated within a community of others as an essential part of her autonomy.<sup>329</sup>

However, Onara writes that Kant's critics accuse him of identifying autonomy with self-control and independence, with extremes of individualism. As a result, Kant is blamed for formulating the unconvincing conception of individual autonomy.<sup>330</sup> According to Kant, '[t]he autonomy of the will is the sole principle of all moral laws and of duties conforming to them'.<sup>331</sup> He viewed autonomy as central to morality.<sup>332</sup> It follows that criticism aimed at his

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<sup>324</sup> J. Kneller, 'The Aesthetic Dimension of Kantian Autonomy' in R. M. Schott (ed), *Feminist Interpretations of Immanuel Kant* (Pennsylvania State University Press 1997), 174-75.

<sup>325</sup> Paton (n97), 97.

<sup>326</sup> Kneller (n324), 175.

<sup>327</sup> Ibid.

<sup>328</sup> Ibid.

<sup>329</sup> Ibid.

<sup>330</sup> Critics of Kant include I. Murdoch, *The Sovereignty of the Good* (Routledge & Kegan Paul 1970) and S. Blackburn, *Ruling Passions: A Theory of Practical Reasoning* (OUP 2001).

<sup>331</sup> Kant *Critique of Practical Reason* (n285), 33.

<sup>332</sup> O'Neill *Autonomy and Trust in Bioethics* (n104), 29.

conception of individual autonomy is inaccurate because Kant's conception of autonomy is 'not a conception of individual autonomy'.<sup>333</sup> O'Neil argues that Kant:

[N]ever speaks of an autonomous self or autonomous persons or autonomous individuals, but rather of the autonomy of reason, of the autonomy of ethics, of the autonomy of principles and of the autonomy of the willing.<sup>334</sup>

Individual autonomy is depicted as a capacity that individuals may have to a greater or lesser degree, which they manifest by acting independently.<sup>335</sup> Kant, however, does not view autonomy as something that some individuals have to a greater and others to a lesser degree. He does not equate it with any form of personal independence. Instead, Kantian autonomy '[I]s manifested in a life in which duties are met, in which there is respect for others and their rights, rather than in a life liberated from all bonds'.<sup>336</sup>

Kant's conception of autonomy is based on acting on certain principles, namely on principles of obligation. 'Obligation' implies 'a constraint to an action, though this constraint is only that of reason and objective law',<sup>337</sup> and the objective necessity to act out of obligation is termed 'duty'.<sup>338</sup> Kant argues that the only motive that can give an action moral worth is reverence for the law.<sup>339</sup> Neither fear nor inclination can be valid motives.<sup>340</sup> This suggests that constraints, which affect an individual's capacity to choose, may undermine her sexual autonomy.

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<sup>333</sup> Ibid, 83.

<sup>334</sup> Ibid.

<sup>335</sup> Ibid, 29.

<sup>336</sup> Ibid, 83.

<sup>337</sup> Kant *Critique of Practical Reason* (n285), 32-3.

<sup>338</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 101.

<sup>339</sup> Ibid.

<sup>340</sup> Ibid.

Oshana articulates that the Kantian conception of the autonomous agent paints an image of the ‘austere, dispassionate moral saint’<sup>341</sup> and this conception of autonomy ‘is a fiction’.<sup>342</sup> She argues that Kantian autonomy is unhelpful because:

A theory of personal autonomy premised on a strict adherence to impartial and abstract principles, or a conception that discounts the roles that emotion and partiality play in our moral development and moral choices, is implausible and unnecessary.<sup>343</sup>

It is implausible because focusing on reason will lead to a denial of certain obvious and desirable features of human beings. The moral norms individuals adhere to would be deprived of their motivational force if individuals were lacking attachments, shaped by friendship, compassion and partiality, that supply much of the subject matter for morality.<sup>344</sup> While she considers it unnecessary to regard autonomous agency as impervious to influences such as desire and emotional attachment, she concedes that autonomous persons in the phenomenal world are as affected by external stimuli as they are by their sentiments and desires.<sup>345</sup> However, Kant’s assertion that ‘I ought never to act except in such a way that I can also will that my maxim should become a universal law’,<sup>346</sup> suggests that it is permissible to include inclinations provided that the rational being is also able to will that her maxim should become universal law. This suggests that inclinations can form part of an individual’s decision-making process in relation to sexual activity with others provided such inclinations were not the only factors affecting her decision. If her decision was purely based on inclinations then she can be said to be acting heteronomously rather than as a sexually autonomous person.

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<sup>341</sup> M. A. L. Oshana, ‘The Autonomy Bogyman’(2001) 35 *The Journal of Value Inquiry* 209, 212.

<sup>342</sup> Ibid.

<sup>343</sup> Ibid.

<sup>344</sup> Ibid.

<sup>345</sup> Ibid.

<sup>346</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 101.

O'Neill rebuts criticism of Kantian autonomy on the grounds that:

His focus was not on any special sort of act of choice, by which each actually chooses laws or principles for everyone else, but on a distinctive constraint or requirement, a test that shows which principles of action could be chosen by all, that is to say which principles are universalisable, or fit to be universal laws.<sup>347</sup>

The dignity of an individual consists of his capacity to make universal law, provided he is also subject to the law, which he formulates.<sup>348</sup> Kantian autonomy allows individuals to choose to act on principles that meet or flout the constraints set by the principle of autonomy, but have reasons to act only on those principles that meet those constraints.<sup>349</sup> The principle of autonomy is, '[n]ever to choose except in such a way that in the same volition the maxims of your choice are also present as universal law'.<sup>350</sup> Therefore, principled autonomy relates to principles or 'laws' that can be adopted by any individual.<sup>351</sup> Kant's concern is not to a self, who can legislate for all, but principles that can be adopted as laws for all.<sup>352</sup> This element of the CI is important in relation to sexual autonomy because it highlights the type of actions capable of violating sexual autonomy, namely those which are used to procure sexual intercourse but are not capable of being universalised.

O'Neill argues that Kantian autonomy is not based in individual autonomy, rather it is concerned with description of 'the autonomy of reason, of the autonomy of ethics, of the autonomy of principles and of the autonomy of willing'.<sup>353</sup> She contends that Kantian autonomy is 'manifested in a life in which duties are met, in which there is respect for other and their rights', in other words, Kantian autonomy is not concerned with 'a life liberated from all bonds'.<sup>354</sup> O'Neill concludes that, for Kant, autonomy is acting on principles of obligation.<sup>355</sup>

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<sup>347</sup> O'Neill, *Autonomy and Trust in Bioethics* (n104), 84.

<sup>348</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 101.

<sup>349</sup> O'Neill, *Autonomy and Trust in Bioethics* (n104), 84.

<sup>350</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 101.

<sup>351</sup> O'Neill, *Autonomy and Trust in Bioethics* (n104), 85.

<sup>352</sup> Ibid, 83.

<sup>353</sup> Ibid.

<sup>354</sup> Ibid.

<sup>355</sup> Ibid.

Principled autonomy does not mean that, if it can be adopted by one individual, then it can be adopted universally. By establishing that a range of fundamental principles cannot be willed as universal law,<sup>356</sup> Kant is suggesting that those who adopt them will conclude that they cannot will that all others adopt the same principle.<sup>357</sup> Thus, an individual who adopts a principle of coercion to obtain sexual intercourse must also employ effective methods of coercion.<sup>358</sup> An individual who wills a principle of coercion as a universal law must also will that every individual employs some effective means of coercion. According to O'Neill, the outcome of anything resembling universalisation of coercion to obtain sexual intercourse:

[W]ould ensure that there could not be universally available effective means to coercion: universal coercion is therefore an incoherent project. Coercion is necessarily a minority pastime, and universal coercion cannot be willed without internal contradiction.<sup>359</sup>

The internal contradiction is a result of the fact that in a world where all individuals are committed to a principle of coercion, some individuals might be unable to exercise a principle of coercion because their capacities for action would be destroyed or bypassed by another's coercive action.<sup>360</sup> Similarly, fraud 'can never rank as a universal law of nature and be self-consistent, but must necessarily contradict itself'.<sup>361</sup> Therefore, procuring sexual activity, through coercion or deception, is inconsistent with the CI on the grounds that it could have harmful effects and consequences if it were adopted as a principle by all. Therefore, coercion and deception undermine sexual autonomy within a Kantian framework.

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<sup>356</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 84.

<sup>357</sup> O'Neill, *Autonomy and Trust in Bioethics* (n104), 86.

<sup>358</sup> Whether through violence, intimidation or non-violent coercive conduct.

<sup>359</sup> O'Neill, *Autonomy and Trust in Bioethics* (n104), 87.

<sup>360</sup> Ibid.

<sup>361</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 84.

O'Neill states that the 'rejection of principles that cannot be principles for all is, on Kant's view, the basis of human duty.'<sup>362</sup> She highlights the importance of Kantian autonomy by stating that:

Principled autonomy requires that we act only on principles that can be principles for all; it provides a basis for an account of the underlying principles of universal obligations and rights that can structure relationships.<sup>363</sup>

A commitment to principled autonomy allows individuals to reject coercion and deception. O'Neill argues that one advantage of taking them seriously is that they provide the basis for an informed consent requirement:

[A]ction that either coerces or deceives others stands in the way of free and informed consent; conversely where free and informed consent is given, agents will have a measure of protection against coercion and deception.<sup>364</sup>

Protection from coercion and protection of autonomy are closely related but are sometimes difficult to distinguish.<sup>365</sup> Physical coercion undermines autonomy, but much interference with autonomy does not involve any coercion at all.<sup>366</sup> While individual autonomy is constantly at odds with relations of trust, Kantian (principled) autonomy provides a basis for relations of trust.<sup>367</sup> The importance of rejecting coercion and deception is highlighted by Muehlenhard and Schrag, '[f]or women to be truly free and autonomous, we must be free of all forms of coercion'.<sup>368</sup> The reason for this is that all coercive behaviour seeks to procure sexual contact which the other person would not otherwise choose.<sup>369</sup> In other words, a person violates another's sexual autonomy whenever he attempts to engage in sexual intercourse with consent that was obtained by coercion.<sup>370</sup> This argument is consistent with

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<sup>362</sup> O'Neill, *Autonomy and Trust in Bioethics* (n104), 88.

<sup>363</sup> Ibid, 96.

<sup>364</sup> O'Neill, *Autonomy and Trust in Bioethics* (n104), 96.

<sup>365</sup> Schulhofer (n13), 99.

<sup>366</sup> Ibid, 100.

<sup>367</sup> O'Neill, *Autonomy and Trust in Bioethics* (n104), 96.

<sup>368</sup> C. Muehlenhard and J. Schrag, 'Nonviolent Sexual Coercion' in Parrot, A. and L. Bechhofer (eds.), *Acquaintance Rape: The Hidden Crime* (John Wiley & Sons 1991), 115.

<sup>369</sup> Schulhofer (n13), 115.

<sup>370</sup> Ibid.



Kantian philosophy. According to Kant, deception and false promises are impermissible because they cannot be universalised and therefore violate sexual autonomy.

The FUL<sup>371</sup> points to a powerful moral claim: it is a way of confirming whether the action an individual is about to undertake places his interests above everyone else's.<sup>372</sup> Individuals, who violate the sexual autonomy of others, whether through violent conduct or non-violent coercive conduct, do not suppose that universalising such conduct would be coherent. Instead, as Kant argues, they make an exception for themselves:

If we now attend to ourselves whenever we transgress a duty, we find that we in fact do not will that our maxim should become a universal law – since this is not impossible for us – but rather that its opposite should remain a law universally: we only take the liberty of making an exception to it for ourselves (or even just for this once) to the advantage of our inclination.<sup>373</sup>

If individuals are committed to adopting principles that they could will others to adopt, such individuals will have reason to reject principles that undermine sexual autonomy, such as fraud and violence and non-violent coercion. This line of reasoning is endorsed by the FH which states that:

Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.<sup>374</sup>

When a person obtains sexual activity through fraud, violence or coercion, he is using the other person as a means to satisfy his inclinations, not treating her as an end worthy of respect. Kant states that:

[M]an, and in general every rational being, exists as an end in himself, not merely as a means for arbitrary use by this or that will: he must in all his actions, whether

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<sup>371</sup> Act only on that maxim through which you can at the same time will that it should become a universal law.

<sup>372</sup> Sandel (n86), 121.

<sup>373</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 87.

<sup>374</sup> Ibid, 91.

they are directed to himself or to other rational beings, always be viewed at the same time as an end.<sup>375</sup>

Therefore, self-respect and respect for other persons stem from one and the same principle.<sup>376</sup> The duty of respect is a duty which an individual owes to others as rational beings. Any principle of action whose universal adoption is likely to destroy capacities for action for others cannot be willed as a universal law.<sup>377</sup>

### **Feminist critique of the law of rape**

The following section will address the feminist critique of the law relating to sexual offences and the concept of autonomy. It has been stated that according to Kant ‘Autonomy of the will is the property the will has of being law unto itself (independently of every property belonging to the objects of volition)’.<sup>378</sup> For Kant, an individual is autonomous only when they are able to formulate a categorical imperative untainted by external pressures.

Chapter three will critique the previous law relating to sexual offences in order to show that the previous model did not adequately protect sexual autonomy. This thesis argues that a Kantian model is an effective method for the protection of a complainant’s sexual autonomy, irrespective of gender and sexuality. It is important to note that females vastly outnumber males in terms of being victims of sex offences. According to the Ministry of Justice, between 2009 and 2012, there were an estimated of 69,000 female rape victims compared to 9,000 male rape victims.<sup>379</sup> Therefore, a model which incorporates Kantian autonomy must address the concerns of feminist writers in relation to both Kant and autonomy. Chapter three will provide a critical analysis of the fact that a model based on patriarchy will not protect sexual autonomy effectively.

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<sup>375</sup> Ibid, 80.

<sup>376</sup> Sandel (n86), 123.

<sup>377</sup> O’Neill, *Autonomy and Trust in Bioethics* (n104), 88.

<sup>378</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 101.

<sup>379</sup> Ministry of Justice, ‘An Overview of Sexual Offending in England and Wales’ (Home Office 2013) <https://www.gov.uk/government/publications/an-overview-of-sexual-offending-in-england-and-wales> accessed 21 June 2014.

In order to protect sexual autonomy effectively, the proposed Kantian model will address feminist concerns regarding coercion and pressures. An effective model is one which is capable of protecting sexual autonomy in cases involving external pressures which impact on the complainant's decision making process. Nussbaum uses the theory of 'adaptive preference' to describe the case of economically deprived working women in India who, despite being subjected to violence by their spouses, choose to remain in the marriage.<sup>380</sup> Adaptive preference is the unconscious altering of an individual's preferences in light of the options that are available to her.<sup>381</sup> Friedman contends that women who remain in abusive relationships may be autonomous because adapting to an abusive relationship is in principle compatible with the critical reflection necessary for autonomy.<sup>382</sup> Friedman's analysis fails to take into account that an individual who agrees to remain in an abusive relationship might be doing so because her decision making process is being undermined by the actions of the defendant. In such a case the complainant's sexual autonomy is undermined by the actions of the defendant.

Autonomy is also important to feminists in relation to cases which involve an individual adopting practices of oppression which severely restrict a complainant's options.<sup>383</sup> Oshana argues that severely limiting external factors undermine autonomy. Meyers on the other hand writes that there are women who participate in the practice of female genital mutilation 'who conclude that cultural traditions or cohesion or getting married and bearing children are more important than bodily integrity'.<sup>384</sup> Thus feminist writers have different views on the impact of oppression on a woman's autonomy.

A Kantian framework takes into account the factors which are relevant to the individual complainant and whether the defendant's actions placed his interests above those of the complainant. A similar conception of autonomy can be seen in the work of Friedman and Meyers who assert that autonomy is a matter of degree. According to Friedman, autonomy is identified in degrees because an individual's capacity for critical reflection may operate at

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<sup>380</sup> M. Nussbaum, 'Adaptive Preferences and Women's Options' (2001) 17 *Economics and Philosophy* 67, 68.

<sup>381</sup> B. Colburn, 'Autonomy and Adaptive Preferences' (2011) 23 *Utilitas* 52, 52.

<sup>382</sup> M. Friedman, *Autonomy, Gender, Politics* (OUP 2003), 146.

<sup>383</sup> For example, arranged marriages.

<sup>384</sup> D. T. Myers, 'Feminism and Women's autonomy: The Challenge of Female Genital Cutting' (2000) 31 *Metaphilosophy* 469, 479.

different levels of sophistication, depending on the individual's socialising and educational influences. Meyers<sup>385</sup> is of the opinion that oppressive social factors undermine pragmatic autonomy<sup>386</sup> but may not necessarily hinder local autonomy.<sup>387</sup> This thesis will demonstrate that a Kantian model focuses on the individual complainant and does not rely on set categories which vitiate consent. Friedman states that personal autonomy 'involves acting and living according to ones' own choices, values, and identity within the constraints of what one regards as morally permissible'.<sup>388</sup>

Since females vastly outnumber males in terms of being victims of sexual offences, the Kantian model proposed in this thesis interprets Kantian autonomy in a manner which avoids stereotypical male traits, and incorporates traits which are popularly regarded as feminine such as social interactiveness.<sup>389</sup> Kantian autonomy allows an individual to set her own standards with regards to agreeing to sexual activity. A further advantage of using Kantian autonomy over other conceptions of autonomy is that the principles which an individual selects for herself 'will be ones that every autonomous person would accept'.<sup>390</sup> In order to protect autonomy effectively, a Kantian model must be compatible with influences such as desires and emotional attachment. Oshana states that 'a person can be self-governing even if her actions are prompted by desires, attachments, and values that are unique to her'.<sup>391</sup>

Despite feminist reservations concerning the concept of autonomy,<sup>392</sup> it has been acknowledged as a valuable conceptual element in feminist ideals, such as identification and elimination of social conditions that victimise women.<sup>393</sup> Calhoun warns that:

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<sup>385</sup> Ibid, 48.

<sup>386</sup> The capacity to decide major life issues, such as whether to embark on a particular career or whether to be a mother.

<sup>387</sup> An individual's capacity to decide in a particular situation.

<sup>388</sup> M. Friedman, 'Autonomy, Social Disruption, and Women' in C. Kackenzie and N. Stoljar, (eds) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (2000) OUP, 37.

<sup>389</sup> Ibid, 39.

<sup>390</sup> M. Oshana, *Personal Autonomy in Society* (2006) Ashgate, 11.

<sup>391</sup> Ibid, 12.

<sup>392</sup> C. Calhoun, 'Justice, care, and gender bias' (1988) 85 *The Journal of Philosophy* 455; J. Grimshaw, 'Autonomy and identity in feminist thinking' in M. Griffiths and M. Whitford (eds), *Feminist Perspectives in Philosophy* (Indiana UP 1988); S. E. Babbitt, 'Feminism and Objective Interests: The Role of Transformation Experiences in Rational Deliberation' in L. Alcoff and E. Potter (eds), *Feminist Epistemologies* (Routledge 1993); K. Abrams, 'From Autonomy to Agency: Feminist Perspectives on Self-Direction' (1991) 40 *Wm and Mary L Rev* 805; E.F. Kittay, *Love's Labor: Essays on Women, Equality, and Dependency*. New York: (Routledge 1999).

[T]oo much talk about our similarities as moral selves, and too little talk about our differences has its moral dangers...unless we are quite knowledgeable about the substantial differences between person, particularly central differences due to gender, race, and class, we may be tempted to slide into supporting that our common humanity includes more substantive similarities than it does in fact.<sup>394</sup>

Grimshaw argues that the issue regarding autonomy and identity in feminist thinking is not whether the focus should continue on concepts such as 'identity' or 'autonomy', or indeed a complete rejection of these concepts. Instead, she proposes a solution which centres on the dialectic of autonomy, which involves a 'constant (but never static or final) search for control and coherence which needs balancing against a realism and tolerance born out of efforts to understand ourselves (and others) better'.<sup>395</sup>

The above criticism relate to the general definition of autonomy rather than the Kantian notion of autonomy. Assister states that according to the Kantian notion, 'a person is autonomous if he or she subscribes to principles that have been formed by his or her own moral scrutiny'.<sup>396</sup> An individual's autonomy is violated when they are treated as a means to someone else's end, and not as an end in themselves.<sup>397</sup> Kantian autonomy provides an opportunity for a complainant to set her own standards in relation to sexual intercourse. Her autonomy is violated, within a Kantian framework, when she is denied the opportunity to evaluate her options due to the defendant's conduct.

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<sup>393</sup> Christman, 'Constructing the inner citadel' (n76).

<sup>394</sup> Calhoun (n392), 455.

<sup>395</sup> Grimshaw (n392), 105-6.

<sup>396</sup> A. Assister, 'Autonomy and Pornography' in M. Griffiths and M. Whitford (eds), *Feminist Perspectives in Philosophy* (Indiana UP 1988), 58.

<sup>397</sup> Ibid, 59.

### The impact of patriarchy on sex offences law

Thorbon notes that '[i]n the beginning of our story all significant societies were clearly patriarchal'.<sup>398</sup> Walby defines patriarchy as 'a system of social structures and practices in which men dominate, oppress and exploit women'.<sup>399</sup> This section will examine the extent to which patriarchy has influenced the evolution of the law relating to sexual offences. It will also examine the concerns of feminist writers regarding the concept of patriarchy and its influence on the development of sexual offences law, in order to develop a Kantian model which adequately protects sexual autonomy.

Brownmiller reports that:

The earliest form of permanent, protective conjugal relationship, the accommodation called mating that we now know as marriage, appears to have been institutionalized by the male's forcible abduction and rape of the female.<sup>400</sup>

She further adds that:

It seems eminently sensible to hypothesize that man's violent capture and rape of the female led first to the establishment of a rudimentary mate-protectorate and then sometime later to the full blown male solidification of power, the patriarchy.<sup>401</sup>

The law of sexual offences' failure until 1994 to encompass any form of sexual assault other than vaginal may be due to the early origins of the offence.<sup>402</sup> As stated above, historically, the objective of the law appears to have been concerned with theft of virginity, abduction, and forced marriage. In 1244, the court disallowed the complainant's appeal of rape 'because a woman can only appeal concerning rape of her virginity'.<sup>403</sup> This preoccupation with the protection of virginity can be seen as late as 1841, where the courts were discussing whether,

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<sup>398</sup> G. Therbon, *Between Sex and Power: Family in the World 1900 -2000* (Routledge 2004), 17.

<sup>399</sup> S. Walby, *Theorizing Patriarchy* (Blackwell 1990), 20.

<sup>400</sup> S. Brownmiller, *Against Our Will: Men, Women, and Rape* (Penguin Books 1986), 17.

<sup>401</sup> Ibid, 17.

<sup>402</sup> J. Temkin, *Rape and the Legal Process* (2<sup>nd</sup> edn, OUP 2002), 56.

<sup>403</sup> PRO Just 1/175, m44d in J. Temkin, *Rape and the Legal Process* (2<sup>nd</sup> edn, OUP 2002), 57.

in the case of a young female complainant, there was sufficient penetration to amount to rape where the hymen remained intact.<sup>404</sup>

The impact of patriarchy on the law of sexual offences is also demonstrated by the marital rape exemption.<sup>405</sup> The Police Advisory Committee did not consider marital rape as a serious social problem,<sup>406</sup> despite the fact that a study, conducted in 1978, had shown that 14% of female householders had been the victims of rape or attempted rape by their husbands or ex-husbands.<sup>407</sup> The marital rape exemption has been attributed to Sir Matthew Hale, which he justified on the grounds that:

The husband cannot be guilty of rape committed by himself upon his lawful wife, for their mutual matrimonial consent and contract the wife has given up herself to this kind unto her husband, which she cannot retract.<sup>408</sup>

It is important to note that Hale's contractual analysis was based on fiction because even if a wife had expressly agreed to sexual intercourse on demand, her promise would not have been binding under English law of contract.<sup>409</sup>

Feminist writers were instrumental in drawing attention to the injustice of exempting husbands who forcibly obtained sexual intercourse with their wives. Freeman states:

If rape is the most underreported of crimes, then marital rape, which is not even considered a crime, must be the least complained about category of rape'.<sup>410</sup>

Adamo writes that:

Rape violates a woman's bodily integrity, freedom, and self-determination; the harm is not mitigated because rape occurred in her marriage bed. Marital rape can be more traumatic and abusive than stranger rape.<sup>411</sup>

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<sup>404</sup> *R v Hughes* (1841) 9 C&P 752.

<sup>405</sup> Abolished in England and Wales by the decision in *R v R* [1991] 4 All ER 481.

<sup>406</sup> CLRC (1980), para 32

<sup>407</sup> D. E. H. Russell, *Rape in Marriage* (Indiana University Press 1982).

<sup>408</sup> M. Hale, *History of the Pleas of the Crown*, vol 1 (first published 1736, Gale ECCO 2010), 629.

<sup>409</sup> Temkin, *Rape and the Legal Process* (n402), 56.

<sup>410</sup> M. D. A. Freeman, 'But if you can't rape your wife, who(m) can you rape? The marital rape exemption re-examined' (1981) 15(1) Family Law Quarterly 1, 6.

Thus, purely patriarchal attitudes lead to a period where a married woman's sexual autonomy was not protected by the criminal law. It, therefore, is vital to take into account feminist theories in relation to the development of the law of sexual offences. According to Temkin, feminist writers have criticised the law of rape on the ground that:

[I]t fails to protect women, is biased against them and rests on derogatory assumptions about them. There is a widespread belief that the treatment of rape victims by the legal process discourages them from reporting crimes and that the rules of evidence which apply in rape cases permit rapists to avoid conviction.<sup>412</sup>

The above analysis reveals that a patriarchal society viewed women in terms of property. Thus, a woman's sexuality is a thing to be stolen, sold or bartered.<sup>413</sup> This thesis will argue that a Kantian framework is an effective method for protecting sexual autonomy. According to Edwards:

It has been a major consideration of the critique of law by contemporary feminists to transform law in a way which embraces women's experiences and is more consonant with their lives.<sup>414</sup>

It will be argued that a Kantian model protects sexual autonomy more effectively than the previous models because it allows the complainant to set her own standards in terms of factors which are important to her decision making in regards to agreeing to sexual activity.

It will shown in chapter two that the majority of the courts decided to focus on 'without her consent' rather than the issue of whether force used with regards to determining whether the defendant committed rape. Edwards states that '[t]he concen to shift the vortex of interpretation on rape as conduct 'against her will' to a matter of 'does not consent' has been central to feminist politics on rape'.<sup>415</sup> Purely masculinist assumptions about how and when a

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<sup>411</sup> S. A. Adamo, 'The Injustice of the Marital Rape Exemption: A Survey of Common Law Countries' (2012) 4(3) American University International Law Review 555, 562.

<sup>412</sup> J. Temkin, 'Towards a Modern Law of Rape' [1982] MLR 399, 399.

<sup>413</sup> C. A. MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, 1989), 173.

<sup>414</sup> S. S. M. Edwards, *Sex and Gender in the Legal Process* (Blackstone Press 1996), 90.

<sup>415</sup> Ibid, 337.



complainant's lack of consent can be manifested, were responsible for shaping the law in relation to the circumstances which vitiate consent.<sup>416</sup>

### Sexual objectification

MacKinnon states that:

All women live in sexual objectification the way fish live in water. Given the statistical realities, all women live all the time under the shadow of the threat of sexual abuse.<sup>417</sup>

In order to adequately protect sexual autonomy, it is important to determine whether the complainant's sexual autonomy has been violated by the defendant's actions. It is important 'to distinguish rape from sex in specific cases'<sup>418</sup> such as non-violent coercion and deceptions.

A woman is regarded as lacking autonomy if she is treated as a mere object under Kantian autonomy:

Sexual love makes of the loved person an Object of appetite; as soon as that appetite has been stilled, the person is cast aside as one casts away a lemon which has been sucked dry as soon as a person becomes an Object of appetite for another, all motives of moral relationship cease to function, because as an Object of appetite for another a person becomes a thing and can be treated and used as such by everyone.<sup>419</sup>

The person is, thus, transformed into a 'thing'. Papadaki states that:

[O]bjectification, for Kant, involves the reduction of a person to the level of an object for use; a mere instrument. Objectification, therefore, constitutes the loss of

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<sup>416</sup> Ibid, 337.

<sup>417</sup> MacKinnon (413), 149.

<sup>418</sup> Ibid, 177.

<sup>419</sup> Kant, *Lectures on Ethics* (n21), 163.

an individual's humanity; she no longer has a dignity, an absolute value, but only a relative or instrumental value.<sup>420</sup>

When a woman is reduced, by the actions of the defendant, to 'an object of appetite', she becomes a thing, and can be treated and used 'as an instrument for the satisfaction of sexual inclination'.<sup>421</sup> Under Kantian autonomy, a woman is objectified by another where he treats her as a means, and not at the same time as an end in herself. Addressing the issue of objectification within sexual offences is vital because:

To be sexually objectified...threatens further degradation, such as rape, where the victim is treated as instrumental, fungible and sometimes owned, and experiences her autonomy and boundary integrity as violated.<sup>422</sup>

Kant states that 'as object of the other's appetite, that person is in fact a thing, whereby the other's appetite is sated'.<sup>423</sup> Sexual objectification constitutes the loss of an individual's humanity because she no longer possesses dignity, but only an instrumental value.<sup>424</sup> Objectification, for Kant, is the lowering of an individual to the status of an object.<sup>425</sup> By lowering an individual to the status of an object, her autonomy is not respected. Kant's description of objectification is adopted by feminists who view objectification to involve treating an individual in such a way that she is reduced to the status of an object for use.<sup>426</sup> Objectification, for Dworkin, occurs when a human being is made less than human by being turned into a commodity.<sup>427</sup> She argues that individuals who can be used as if they are not fully human are no longer fully human in social terms because 'their humanity is hurt by being diminished'.<sup>428</sup> Mackinnon employs Kantian philosophy when she writes that:

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<sup>420</sup> E. Papadaki, 'Sexual Objectification: From Kant to Contemporary Feminism' (2007) 6 Contemporary Political Theory 300, 340.

<sup>421</sup> Kant, *Lectures on Ethics* (n21), 163-164.

<sup>422</sup> L. Kelland, 'Conceptually situating the harm of rape: an analysis of Objectification' (2001) 30(2) South African Journal of Philosophy 168, 177.

<sup>423</sup> Kant, *Lectures on Ethics* (n21), 156.

<sup>424</sup> Papadaki (n420), 340.

<sup>425</sup> Ibid, 339.

<sup>426</sup> Ibid, 340.

<sup>427</sup> A. Dworkin, 'Against the Male Flood: Censorship, Pornography, and Equality', in D. Cornell (ed), *Oxford Readings in Feminism: Feminism and Pornography* (OUP 2000), 30-31.

<sup>428</sup> Ibid, 31

A person, in one Kantian view, is a free and rational agent whose existence is an end in itself, as opposed to instrumental. In pornography women exist to the end of male pleasure.<sup>429</sup>

She argues that a 'sex object is defined on the basis of its looks, in terms of its usability for sexual pleasure'.<sup>430</sup> Mackinnon is essentially incorporating a Kantian framework into an anti-pornography argument by suggesting that the expression and fulfilment of sexual desire involves men taking control of women's bodies in such a way that they fail to respect women as individuals.<sup>431</sup> In relation to the usability of an individual, Kant writes that as soon as a person is used for sexual purposes they are discarded 'as one throws away a lemon after sucking the juice from it'.<sup>432</sup> Mackinnon states that pornography turns a woman into an object for sexual use.<sup>433</sup> She adopts a similar analogy when she compares women to cups 'valued according to its looks and for how it can be used'.<sup>434</sup> For Mackinnon, pornography involves men treating women as mere instruments in order to satisfy their sexual desires. Treating an individual simply as a means can amount to a violation of their sexual autonomy. Nussbaum notes that:

It would appear that Kant, Mackinnon, and Dworkin are correct in one central insight: that the instrumental treatment of human beings, the treatment of human beings as tools of the purposes of another, is always morally problematic'.<sup>435</sup>

Sexual objectification as described by Kant, involving the treatment of a person as a mere sexual instrument, is acknowledged by feminist writers as a problematic phenomenon.<sup>436</sup> While Dworkin and Mackinnon contend that women are by definition the objectified, Kant did not take this to be a necessary fact.<sup>437</sup> He did not exclude the possibility of a woman objectifying a man if she happens to be in a position of power within a certain relationship.<sup>438</sup>

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<sup>429</sup> C. A. Mackinnon, *Feminism Unmodified* (HUP 1987), 158.

<sup>430</sup> Ibid, 173.

<sup>431</sup> Shrage 'Feminist Perspectives on Sex Markets' (n303).

<sup>432</sup> Kant, *Lectures on Ethics* (n21), 156.

<sup>433</sup> Mackinnon, *Towards a Feminist Theory of the State* (n413), 138.

<sup>434</sup> Ibid.

<sup>435</sup> M. C. Nussbaum, 'Objectification' (1995) 24(4) *Philosophy and Public Affairs* 249, 289.

<sup>436</sup> Papadaki (n420), 341.

<sup>437</sup> Ibid, 342.

<sup>438</sup> Ibid.

Therefore, feminist commentators agree that objectification, as described by Kant, violates sexual autonomy.

To fall within Kant's definition of autonomy, individuals' moral principles, which they select as appropriate guidelines for action, must be chosen by abstraction 'from the personal differences between rational beings, and from all the content of their private ends'.<sup>439</sup> This Kantian ideal suggests that moral principles are self-imposed only insofar as they stem from a person's universal, rational nature.<sup>440</sup>

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<sup>439</sup> Paton (n97), 95.

<sup>440</sup> Oshana (n341), 211.

## Conclusion

This chapter has highlighted that the concept of autonomy is capable of containing a variety of philosophical meanings. The common element contained in the various definitions of autonomy is the individual's capacity for self-determination. Kantian autonomy, which is a form of moral autonomy distinct from personal autonomy, is concerned with an individual's capacity to deliberate and to provide herself with the moral law, which is universal for all, rather than being influenced by external factors. Personal autonomy, on the other hand, is the capacity of an individual to decide for herself and pursue a course of action, often not dependent on any moral content. The importance of using a Kantian framework for the protection of sexual autonomy, is highlighted by the fact that sexual objectification, within Kantian autonomy, has been acknowledged by feminist writers such as Papadaki<sup>441</sup> as being problematic. Moreover, Kantian autonomy allows for the fact that a woman can objectify a man. A Kantian model is, therefore, capable of protecting the sexual autonomy of both men and women.

It has been shown that Kant's supreme principle of morality, which can be represented in several other formulae, is the governing principle of any rational individual with autonomy of the will. This chapter has identified Kant's notion of autonomy in a theoretical context in order to show that it is an effective method for the protection of sexual autonomy. The analysis carried out in this chapter in relation to Kantian autonomy will be used to answer the central research questions, namely: is the current law relating to sexual offences consistent with Kantian autonomy and what are the practical limitations of applying a Kantian model to the protection of sexual autonomy?

The analysis in relation to the CI will be used in this thesis to determine whether it can be applied to the protection of individuals in situations where sexual activities might be procured as a result of deception or non-violent coercion.

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<sup>441</sup> Papadaki (n420).

## Chapter Three: An Analysis of the law of sexual offences prior to the Sexual Offences Act 2003

### Introduction

This chapter will provide an analysis of whether the previous law of sexual offences gave rise to any inconsistencies in relation to the protection of sexual autonomy in a practical context. The overall aim of this chapter is to provide a critical analysis of whether the previous law of sexual offences provided a more effective method of protecting sexual autonomy than a Kantian model. This chapter will assess the development of the historical methods of protecting sexual autonomy in order to determine their effectiveness in protecting sexual autonomy in comparison to Kantian autonomy. It was stated in chapter two<sup>442</sup> that to act autonomously within a Kantian model is to act in such a way that an individual treats humanity never simply as a means but always at the same time as an end.<sup>443</sup> A defendant who has sexual intercourse with a complainant against her will is violating her sexual autonomy because he is using her to satisfy his sexual desires and is failing to treat her as a rational being worthy of respect. The complainant, on the other hand, is denied freedom by having her autonomy violated by the defendant because his actions are preventing her from self-legislation. Korsgaard states that according to Kantian autonomy ‘you treat someone as a mere means whenever you treat him in a way to which he could not consent’.<sup>444</sup>

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<sup>442</sup> Page 56.

<sup>443</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 91.

<sup>444</sup> Korsgaard, *Creating the Kingdom of Ends* (n444), 295.

### **Historical developments relating to the protection of sexual autonomy**

Prior to the Norman conquest of 1066, the offence of rape was primarily concerned with the protection of highborn, propertied virgins living under the protection of a lord.<sup>445</sup> Since women during this period could only inherit property in the absence of extant male heirs, forcible abduction and marriage become a method of acquiring property.<sup>446</sup> This suggests that the law at the time did not adequately protect sexual autonomy. The defendant's actions undermined a woman's capacity to make choices as she is being used as a means to the attainment of ends based on his inclinations. According to Paton, 'setting of ends before oneself is the essential mark of freedom'.<sup>447</sup> It follows that a woman is prevented from setting ends before herself and therefore her freedom is limited by the defendant's actions. Procuring sexual intercourse by coercion fails to respect the dignity of the complainant. The defendant's actions of employing coercive means to procure sexual intercourse fail the test of universality because it cannot be willed that every individual can use coercion to procure sexual intercourse. This method of protecting sexual autonomy is limited to protecting the sexual autonomy of highborn, propertied virgins living under the protection of a lord. A Kantian model, on the other hand, provides a more effective method of protecting sexual autonomy because it examines whether the complainant's freedom is undermined by the actions of the defendant. In addition, Kantian autonomy applies equally to all rational individuals as opposed to having limited application to a certain class of individuals.

By 1275, the first statute of Westminster had extended the offence of rape by including other categories of females. This was achieved by removing the distinction based on virginity.<sup>448</sup> This is a positive step in terms of increasing the protection of the class of individuals. However there were shortcomings in terms of effectively protecting sexual autonomy: the offence of rape could only be committed if it was against the complainant's will. Force was a necessary requirement in order to establish that the offence had been committed. Such a requirement ignores the fact that violation of sexual autonomy can be carried out by

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<sup>445</sup> Brownmiller (n400), 24.

<sup>446</sup> Ibid.

<sup>447</sup> Paton (n97), 181.

<sup>448</sup> Britton in 1290 wrote that, 'rape is a felony committed by a man by violence on the body of a woman, whether she be a virgin or not' in F. M. Nichols (trs), *Britton: An English translation and notes* (John Byrne & Co. 1901), 46.

employing non-violent methods such as coercion, deception or having sexual intercourse with a complainant who is unconscious. It is submitted that the first statute did not go far enough in terms of protecting sexual autonomy. Kantian autonomy provides a more effective method for protecting sexual autonomy because it focuses on whether the defendant is respecting the complainant's humanity and whether he is treating her simply as a means.

More satisfactory protection was provided in 1285 by the second statute of Westminster. This statute adopted a consent-centric model in relation to the protection of sexual autonomy. Thus, it was an offence 'if a man so ravish a married woman, dame or damsel where she neither consented before or after'. While 'consent' was not defined in the second statute, it can be argued that the consent-centric definition of the offence of rape in the second statute is consistent with Kantian autonomy. In order for the complainant to consent to sexual activity, her consent must be free and unconstrained. Where a complainant does not consent to sexual activity, her capacity to self-legislate is undermined by the defendant's actions. Since Kantian autonomy relates to the capacity to self-legislate and involves independence from heteronomous factors,<sup>449</sup> it follows that a complainant who does not consent to sexual intercourse cannot be said to have the freedom and capacity to self-legislate because her autonomy is undermined.

The period after the statutes of Westminster witnessed a dearth in writers on English law. As a result, the development of the law can only be traced in the statutes and yearbooks.<sup>450</sup> By the seventeenth century, rape was defined as unlawful carnal knowledge of any woman,<sup>451</sup> by force,<sup>452</sup> and against her will.<sup>453</sup> The complainant's consent had to be genuine in that it could not be obtained by fear of death or duress.<sup>454</sup> Although this definition was an improvement on the definition of rape under the statutes of Westminster, in that it widened the class of individuals and an individual's consent had to be genuine, it was not fully consistent with

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<sup>449</sup> Kant, *Critique of Pure Reason* (n224), 377.

<sup>450</sup> J. F. Stephen, *A History of the Criminal Law of England*, vol 2 (MacMillan & Co. 1883), 202.

<sup>451</sup> E. Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason and Other Pleas of the Crown and Criminal Causes* (E and R Brooke 1979), 60.

<sup>452</sup> According to Hawkins, a threat of force was the equivalent of force in law, in W. Hawkins, *A Treatise Pleas of the Crown* (first published 1716, The Lawbook Exchange Ltd 2011), 108.

<sup>453</sup> J. F. Archbold, *Pleading and Evidence in Criminal Cases* (first published 1822, Sweet & Maxwell 1922), 260.

<sup>454</sup> K. L Koh, 'Consent and Responsibility in Sexual Offences' [1968] Crim LR 81, 87.



Kantian autonomy. Evidence of this can be seen in the fact that a complainant's sexual autonomy is not protected where the defendant procures sexual activity by deception or coercion. As discussed in chapter two, procuring sexual activity through coercion or fraud results in a violation of the complainant's sexual autonomy because she is being used merely as a means and not as an end. The complainant's sexual autonomy is undermined because her actions are not the result of self-legislation and her decision to engage in sexual activity is influenced by the defendant's actions.

### **A Consent-centric model**

According to Koh, the different attitudes of the courts in relation to the effect of fraud in rape led to two judicial interpretations.<sup>455</sup> The first view followed a narrow interpretation in that rape involved intercourse 'against her will'.<sup>456</sup> The complainant was required to provide evidence that she had resisted against force or violence. This interpretation is not consistent with a Kantian model of autonomy because the complainant's sexual autonomy is not protected where the defendant employs fraud or coercion to procure sexual intercourse. The complainant is prevented from choosing principles that can be adopted as laws by all. The actions of a defendant who resorts to force in order to procure sexual intercourse cannot be universalised, because he makes an exception for himself to the advantage of his inclinations.<sup>457</sup> This judicial view is not consistent with Kantian autonomy because it supports principles of action whose universal adoption is likely to destroy capacities for action for others and therefore cannot be willed as a universal law.<sup>458</sup>

The second judicial view argued that 'against her will' was synonymous with 'without her consent'.<sup>459</sup> This view appears to be more consistent with the Kantian model of autonomy<sup>460</sup>, as it allows individuals to reject coercion and deception. Principled autonomy provides a basis for an account of the underlying principles of universal obligations that can form

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<sup>455</sup> Ibid, 81.

<sup>456</sup> Ibid, 87.

<sup>457</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 87

<sup>458</sup> O'Neill, *Autonomy and Trust in Bioethics* (n104), 88.

<sup>459</sup> Koh (n454), 87.

<sup>460</sup> Discussed in Chapter One.

relationships.<sup>461</sup> This view allowed a complainant to be free and autonomous from coercion and deception and not just from violence. Kantian autonomy holds that deception is impermissible because it cannot be universalised.<sup>462</sup> It follows that obtaining sexual intercourse by methods which cannot be universalised will result in violation of the complainant's sexual autonomy. This judicial interpretation was first seen in the landmark case of *R v Camplin*,<sup>463</sup> where the complainant was supplied with alcohol in order to 'excite her consent' to sexual intercourse.<sup>464</sup> The defence argued that rape was 'having unlawful and carnal knowledge of a woman by force and against her will'.<sup>465</sup> Tadros notes that the problem confronted by the court was that, until then, the *actus reus* of the crime was only complete if force was used to overcome the will of the complainant.<sup>466</sup> The court held that the defendant had procured sexual intercourse without consent and against her will.<sup>467</sup> As a result of the decision in *Camplin*, it was no longer necessary for a prosecution to prove a positive dissent by the complainant; it was now sufficient to show that the complainant did not consent to sexual intercourse. A defendant who procured sexual intercourse without the complainant's consent did not follow the Categorical Imperative (CI) which states that 'I ought never to act except in such a way that I can also will that my maxim should become a universal law'.<sup>468</sup> The decision in *Camplin* protected an individual from another who engages in sexual intercourse as a result of heteronomous factors. A defendant who obtains sexual intercourse without consent is not acting according to the CI because he is not acting according to an unconditional command, 'objectively necessary without reference to some purpose'.<sup>469</sup>

The element of force in rape was also considered in *R v Fletcher*,<sup>470</sup> where the defendant was convicted of raping a thirteen-year-old complainant. The court rejected earlier authorities<sup>471</sup> which stated that force was an essential element of rape. The court in *Fletcher* stated that:

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<sup>461</sup> O'Neill, *Autonomy and Trust in Bioethics* (n104), 96.

<sup>462</sup> Discussed in chapter two.

<sup>463</sup> *Camplin* (1845) 1 CAR & K 746.

<sup>464</sup> *Ibid*, [750].

<sup>465</sup> *Ibid*.

<sup>466</sup> V. Tadros, 'No Consent: A Historical Critique of the *Actus Reus* of Rape' (1999) 3 *Edinburgh Law Review* 317, 321.

<sup>467</sup> This remark is contained in the editorial note of the case in *Camplin* (n399), 91.

<sup>468</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 65.

<sup>469</sup> *Ibid*, 78.

<sup>470</sup> (1859) Bell 63.

The decision in [Camplin] rests upon the authority of an Act of Parliament. The statute of Westminster 2, c.34, defines the crime to be where 'a man do ravish a woman, married, maid, or other, where she did not consent neither before or after'.<sup>472</sup>

The court followed the 'without her consent' approach on the basis that a 'monstrous' result would occur if rape was intercourse 'against the will' of the complainant.<sup>473</sup> The shift towards a consent-centric model in relation to rape rendered the requirements of force and resistance redundant. However, despite this shift towards a more effective method for protecting sexual autonomy, Temkin notes that some judges appear to have been unaware of this shift in emphasis.<sup>474</sup> In *R v Dimes*,<sup>475</sup> Hamilton J stated that:

The jury were directed by the judge that they should not convict of rape unless they were satisfied with the proof given that the appellant had acted violently and against the will of the prosecutrix, and he pointed out, in the appellant's favour, that no screams were heard by the woman in the yard (the prosecutrix did not even allege that she screamed), and no bruises were discovered on the thighs of the prosecutrix, and no other signs of a severe struggle.<sup>476</sup>

Similarly, in *R v Harling*,<sup>477</sup> the trial judge directed that to establish the crime of rape, the prosecution had to prove that sexual intercourse had taken place without the complainant's consent and against her will.<sup>478</sup> The defendant was convicted of rape upon a girl of thirteen years and appealed against his conviction. On appeal, Humphreys J stated that 'In every case of rape it is necessary that the prosecution should prove that the girl or woman did not consent and that the crime was committed against her will'.<sup>479</sup> The courts continued to follow the view that force was a key element in the offence of rape as can be seen in the case of *R v*

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<sup>471</sup> *R v Jackson* (1822) Russ & Ry 487; *R v Williams* (1838) Car & P 286; *R v Clarke* (1849) 2 Car & K 957.

<sup>472</sup> (1859) Bell 63, 71.

<sup>473</sup> Ibid.

<sup>474</sup> J. Temkin, *Rape and the Legal Process* (n402), 90.

<sup>475</sup> (1912) 7 Cr App R 43.

<sup>476</sup> *R v Dimes* (1912) 7 Cr App R 43, 46.

<sup>477</sup> (1938) 26 Cr App R 127.

<sup>478</sup> *R v Harling* (1938) 26 Cr App R 127, 128.

<sup>479</sup> Ibid.

*Howard*,<sup>480</sup> where Lord Parker LCJ,<sup>481</sup> in confirming the decision in *Harling*,<sup>482</sup> stated that in cases of rape, other than where the complainant was a child, the prosecution was required to prove that the complainant had physically resisted.

The approach taken by the courts in the above cases show that the courts' decisions were not consistent with notions of Kantian autonomy. A non consent-centric model does not only deprive an individual of choices, such as when and with whom to engage in sexual activity, but it also fails to protect a complainant who is objectified and treated as a mere means for the satisfaction of the desires of another. The defendants in *Dimes*, *Harling* and *Howard* were acting wrongly, in a Kantian sense, because they were acting on maxims which cannot be universalised. A non consent-centric model does not adequately protect sexual autonomy because an individual is prevented by the actions of another from acting and choosing freely. A maxim which prevents a complainant from choosing freely cannot be universalised without giving rise to a contradiction. The defendants in *Dimes*, *Harling* and *Howard* cannot be said to have assumed that their maxims would be universalised. Instead, they would have made exceptions for themselves to the advantage of their inclinations.

In *R v Linekar*,<sup>483</sup> the defendant had intercourse with the complainant, a prostitute, promising to pay her afterwards. After sexual intercourse had taken place the defendant made off without paying. He was convicted of rape and appealed. The Court of Appeal in allowing the appeal affirmed that an essential element of rape was proof that the complainant did not consent to the act of sexual intercourse with the defendant who penetrated her; that the only frauds which could vitiate consent is in a case of rape were frauds as to the nature of the act itself or as to the identity of the agent.<sup>484</sup> Therefore, it was the absence of consent to sexual intercourse which constituted the offence of rape rather than the fraud. The Court of Appeal stated that the defendant would have been guilty of an offence under s 3 of the Sexual Offences Act 1956 (SOA 1956), but this was not offered as an alternative by the prosecution. Although the defendant's deception was clearly intended to violate the complainant's sexual

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<sup>480</sup> (1966) 50 Cr App R 56.

<sup>481</sup> *R v Howard* (1966) 50 Cr App R 56, 58.

<sup>482</sup> *Ibid.*

<sup>483</sup> [1995] 2 QB 250.

<sup>484</sup> *Ibid.*, 261.

autonomy by depriving her of important information relevant to her decision-making process – whether or not to engage in sexual activity in exchange for money – the SOA 1956 was capable of protecting the complainant’s sexual autonomy in the form of s 3 and therefore it was consistent with Kantian autonomy.

Therefore, the SOA 1956 Act did provide protection of sexual autonomy within a Kantian framework. With regards to the Court’s decision, Herring argues that the ‘error here is to see the only loss in *Linekar* as to the money she was not paid and to ignore the fact that here sexual autonomy had been infringed’.<sup>485</sup> The harm in *Linekar* ‘was the interference of her right to choose with whom and under what conditions to have sexual intercourse and not just the loss of £25’.<sup>486</sup> The defendant’s deception deprived the complainant of making a decision to engage in sexual intercourse based on free and informed consent. She was treated by the defendant as a mere instrument in order to satisfy his sexual desires, rather than an end in herself. Therefore, her sexual autonomy was violated according to the Kantian model.

#### Common law definition of consent

Prior to the Sexual Offences Act 2003 (SOA 2003), the leading authority in relation to the issue of consent was the decision in *R v Olugboja*.<sup>487</sup> The defendant in *Olugboja* informed the complainant, who had already been raped by a co-defendant, that he was going to have intercourse with her and asked her to remove her trousers. It would seem that the complainant had, in effect, agreed to intercourse under pressure of a non-specific kind. The pressure was due to the fact that the defendant’s companion had already raped the complainant and the complainant’s friend.<sup>488</sup> The contention of the defence was that an act can only be considered to have been committed without the complainant’s consent if her will was overborne by force, fear of violence or duress, or fraud.<sup>489</sup> The Court of Appeal rejected this argument and held that the true meaning of consent under the Sexual Offences (Amendment) Act (SOAA 1976) was simply whether the complainant had consented in the

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<sup>485</sup> Herring, ‘Mistaken Sex’ (n11), 524.

<sup>486</sup> Ibid, 523.

<sup>487</sup> *Olugboja* [1982] QB 320.

<sup>488</sup> Ibid, 321.

<sup>489</sup> Ibid, 322.

‘ordinary meaning’ of consent.<sup>490</sup> The court did not leave it to the jury to recognise this ordinary meaning of consent unaided. It stated that:

There is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent.<sup>491</sup>

It was the opinion of the Court that in the majority of cases, where the allegation was that the intercourse was obtained by force or the fear of force, the above direction, combined with specific references to the evidence relevant to the absence of real consent, was sufficient.<sup>492</sup> The court also stated that in the ‘less common type of cases’<sup>493</sup> where sexual intercourse is procured after threats not involving violence or the fear of it, a fuller direction would have to be given to the jury.<sup>494</sup> The court held that the jury:

[S]hould be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse, having regard to all the relevant circumstances; and in particular, the events leading up to the act and her reaction to them showing their impact on her mind.<sup>495</sup>

The Court held that consent is a common word which covers a wide range of states of mind in the context of intercourse, ranging from ‘actual desire’<sup>496</sup> to ‘reluctant acquiescence’.<sup>497</sup> This suggests that a person will be held to have consented to intercourse despite not agreeing out of ‘actual desire’. The court observed that ‘real consent’<sup>498</sup> is a different ‘state of mind’ from ‘mere submission’ and that the difference between the two is a matter of degree.<sup>499</sup> However, there comes a point when a complainant’s state of mind will be so different from ‘actual desire’ that she can no longer be said to have given ‘real consent’, but must be described as giving ‘mere submission’.<sup>500</sup> The Court of Appeal left the task of fixing this

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<sup>490</sup> Ibid, 332.

<sup>491</sup> Ibid.

<sup>492</sup> Ibid.

<sup>493</sup> Ibid.

<sup>494</sup> Ibid.

<sup>495</sup> Ibid.

<sup>496</sup> Ibid, 331.

<sup>497</sup> Ibid.

<sup>498</sup> Ibid, 332.

<sup>499</sup> S. Gardner, ‘Appreciating *Olugboja*’ (1996) 16 Legal Studies 275, 277.

<sup>500</sup> Ibid, 278.

point to the jury ‘applying their combined good sense, experience and knowledge of human behaviour to all the relevant facts of that case’.<sup>501</sup> The Court held that the judge’s direction was close to this approach and therefore had been no misdirection.<sup>502</sup>

The decision in *Olugboja* is significant, in relation to this thesis, because it is consistent with Kantian autonomy and, therefore, is an effective method for protecting sexual autonomy. Individuals are free to set their own standards in relation to the types of factors which negate consent. This is achieved by giving consent its ordinary meaning rather than prescribing a set of circumstances whereby only certain forms of pressure qualify to vitiate consent. By stating that consent covers a wide range of states of mind ranging from ‘actual desire’ to ‘reluctant acquiescence’, it seems reasonable to assume from the court’s analysis of consent that some pressures will be compatible with consent. Gardner argues that a jury might decide that a complainant consents rather than submits if she has intercourse with her partner, despite her own lack of enthusiasm, in order to avoid another late-night discussion of the state of their relationship.<sup>503</sup>

In relation to the protection of sexual autonomy and the decision in *Olugboja*, Gardner notes that:

By rejecting the idea of a rule whereby some kinds of pressure do negative consent, and other kinds do not, as a matter of law, in favour of a position whereby everything depends on the victim’s own feelings, it thus treats sexual autonomy as a matter of personal choice, respecting individuals’ freedom to set their own limits to their consent, be these wide or narrow.<sup>504</sup>

*Olugboja* provided an opportunity for the jury to decide upon the degree of pressure which vitiates consent. This leads to the conclusion that a threat which has a devastating effect on one complainant might appear trivial to another and if both engaged in sexual activity the latter might be held to have consented while the former did not.<sup>505</sup> According to Gardner, it is

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<sup>501</sup> Ibid, 332.

<sup>502</sup> Ibid.

<sup>503</sup> Gardner (n499), 279.

<sup>504</sup> Ibid, 281.

<sup>505</sup> Ibid, 287.

‘this solicitude for the individual in *Olugboja* that marks its commitment to protecting sexual autonomy’.<sup>506</sup> Although *Olugboja* did not deal with cases involving fraud and mistake, Gardner argues that this ‘solicitude for the individual’ can be transferred to these types of cases.<sup>507</sup> He contends that:

[W]e should ask whether the matter about which the victim was mistaken is so important to her – whether or not to other people – that her agreement to intercourse cannot be rightly regarded as consent.<sup>508</sup>

Allowing the complainant’s state of mind to play a part in the protection of her sexual autonomy avoids treating the factors that potentially influence all participants in sexual activities as influencing them according to a uniform pattern.<sup>509</sup> Applying this analysis to the case of *Linekar*,<sup>510</sup> the jury would be invited to consider whether the defendant’s intention to pay played a significant role in the complainant’s decision to engage in intercourse with him. Since the complainant was a prostitute, the jury would most likely have answered in the affirmative.

*Olugboja* focuses on the complainant’s state of mind and allows her to set her own boundaries in relation to the issue of consent. This is in line with the FA, as it focuses on individuals being the potential legislators of laws that are valid for all rational beings. The defendant in *Linekar* clearly did not treat the complainant as an autonomous self-governing agent. Her sexual autonomy was violated because he treated her simply as a means and not as an end in herself. Moreover, his deception deprived her of exercising her free will. Therefore, his actions deprived her of exercising independence in relation to her decision to engage in intercourse. The complainant was deprived of the ability to self-legislate as a result of the defendant’s deception. *Olugboja* protects sexual autonomy by not prescribing set rules whereby an individual’s consent is said to be negated; instead, it allows individuals to set their own standards. It achieves this by examining the importance which the pressure or mistaken belief or fraud had for the individual complainant.

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<sup>506</sup> Ibid.

<sup>507</sup> Ibid.

<sup>508</sup> Ibid.

<sup>509</sup> Ibid.

<sup>510</sup> *Linekar* (n419).



The *Olugboja* approach has been criticised on the basis that it does little to increase the protection of sexual autonomy.<sup>511</sup> According to Temkin, *Olugboja* allows for uncertainty because it transforms issues of law into issues of fact for the jury.<sup>512</sup> Gardener defends the *Olugboja* approach by contending that its ‘resort to jury legislation is in fact bound up with its attentiveness to the individual victim’.<sup>513</sup> He further argues that *Olugboja*’s approach attentiveness to the individual victim ‘renders it relatively acutely calculated to protect sexual autonomy’.<sup>514</sup> The advantage of this approach is that it allows any pressure or mistake which is of sufficient significance to the individual complainant to vitiate consent. Consequently, other pressures or mistakes, which are of no significance to the complainant, will not vitiate consent. *Olugboja* allows for the fact that the complainant’s decision making process is significant in relation to whether she consented to sexual activity. This approach is clearly consistent with Kantian autonomy in relation to the protection of sexual autonomy because a complainant’s consent is vitiated where her capacity for autonomous choice has been hindered by external factors such as pressures and deception. The complainant in *Olugboja* was deprived of the opportunity to act as an autonomous self-governing agent, and, therefore, her consent was vitiated by the defendant’s actions. It is submitted that the barrier to the application of *Olugboja* in a practical context is that it could lead to uncertainty as the issue of consent is left to the jury to determine. According to Temkin:

The decision, in transforming issues of law into issues of fact for the jury, makes for uncertainty. There is no reason to welcome this. There is no way of telling in advance of a court hearing whether in law consent is present or not. In this way the law fails to meet a minimum requirement of clarity, certainty, and comprehensibility.<sup>515</sup>

Kantian autonomy addresses this concern regarding uncertainty because Kant’s Formula of Universal Law (FUL) enjoins individuals to act on maxims through which they can will at the same time that they should be universal law. The CI, therefore, provides a method of testing

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<sup>511</sup> Temkin, *Rape and the Legal Process* (402), 93.

<sup>512</sup> Ibid.

<sup>513</sup> Gardner (n499), 291.

<sup>514</sup> Ibid.

<sup>515</sup> Temkin, *Rape and the Legal Process* (402), 93.

the moral acceptability of what an individual proposes to do with regards to obtaining sexual activity.

A consent-centric model was finally given statutory effect by the SOAA 1976. Section 1(1) of the SOAA 1976 expressly defined rape as sexual intercourse with a woman without her consent. Section 1(1) of the SOA 1956, as substituted by s 142 of the Criminal Justice and Public Order Act 1994 (CJPOA 1994), widened the previous statutory definition to include the protection of men as well. Section 1(2) of the SOA 1956 (which replaced the former definition in s 1 of the SOAA 1976), stated it was an offence for a man to rape a woman or another man, who at the time of the intercourse does not consent to it. Section 1(2) of the SOA 1956, therefore, allowed for the protection of the sexual autonomy of males. This model allowed for sexual intercourse to become rape in the absence of consent. The crucial issue was whether the complainant consented to being penetrated<sup>516</sup> by the other person's penis. It no longer became a requirement that the complainant positively dissented. In relation to protecting sexual autonomy, there was no longer any requirement that the absence of consent had to be demonstrated or that it had to be communicated to the defendant for the *actus reus* of rape to be established.<sup>517</sup>

### **Procuring sexual intercourse by deception**

This section will critically assess the factors undermining sexual autonomy and whether the historical methods provided a more adequate protection of sexual autonomy than Kantian autonomy. It will also illustrate that Kantian autonomy protects sexual autonomy in cases of deception more effectively than the historical models. The effect of fraud on the complainant's consent was reviewed in *R v Clarence*,<sup>518</sup> where the defendant had sexual intercourse with his wife knowing that he was suffering from venereal disease without informing her of this fact. Stephen J stated:

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<sup>516</sup> Whether *per anum* or *per vaginam*.

<sup>517</sup> *R v Malone* [1998] 2 Cr App 447.

<sup>518</sup> (1888) 22 QBD 23. In *R v Dica* [2004] EWCA Crim 1103 the Court of Appeal regarded *Clarence* as being no longer of useful application.

It seems to me that the proposition that fraud vitiates consent in criminal matters is not true if taken to apply in the fullest sense of the word, and without qualification. It is too short to be true, as a mathematical formula is true. If we apply it in that sense to the present case, it is difficult to say that the prisoner was not guilty of rape, for the definition of rape is having connection with a woman without her consent; and if fraud vitiates consent, every case in which a man infects a woman or commits bigamy, the second wife being ignorant of the first marriage, is also a case of rape. Many seductions would be rapes, and so might acts of prostitution procured by fraud, as for instance by promises not intended to be fulfilled. These illustrations appear to shew clearly that the maxim that fraud vitiates consent is too general to be applied to these matters as if it were absolutely true.<sup>519</sup>

He further added that:

The only sorts of fraud which so far destroy the effect of a woman's consent as to convert a connection consented to in fact into a rape are frauds as to the nature of the act itself, or as to the identity of the person who does the act.<sup>520</sup>

The court in *Clarence* held that consent to the sexual intercourse meant that there could be no assault upon which to base liability for a s 20 offence under the Offences Against the Person Act 1861.<sup>521</sup> The complainant's sexual autonomy was not protected under this model due to the marital rape exemption. The defendant, in concealing the fact that he had contracted a sexually transmitted disease, clearly did so because he was aware that his wife would not consent to sexual intercourse. It would appear that the defendant deceived the complainant in order to procure sexual intercourse. Under Kantian autonomy, his actions do not contribute to the Kingdom of Ends because he cannot be said to be engaged 'in the harmonious and cooperative pursuit of the good'.<sup>522</sup> He did not treat his wife as an end; instead, he treated her simply as a means for the purpose of only sexual gratification. By using the complainant

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<sup>519</sup> (1888) 22 QBD 23, 43.

<sup>520</sup> Ibid, 43.

<sup>521</sup> Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour.

<sup>522</sup> Korsgaard (n444), 23.

simply as a means in order to satisfy his sexual desires, the defendant prevented her will from making laws which can be universalised. Korsgaard writes that:

Since we would will a world in which the assistance of others and the resources of human talents were available for use as the means of actions, we would will that each person contributes something to the obligatory ends. The laws we would choose to be under, if it were ours to choose, would be moral laws. When we do obey moral laws, then, we are autonomous and free.<sup>523</sup>

It was argued in chapter one that autonomy is based on the principle that a rational will makes the laws which it obeys, and is the source of the unconditional worth which belongs to moral agents as making laws.<sup>524</sup> Therefore, the defendant in *Clarence*<sup>525</sup> violated her sexual autonomy because she was denied the opportunity to act freely due to his fraud. She was prevented from legislating universal law because her decision to engage in sexual intercourse with a defendant, who had contracted a sexually transmitted disease, cannot be applied universally.

#### Fraud as to the nature of the act

This refers to cases where the complainant has been deceived into believing that it is not a sexual activity she has agreed to. This type of fraud is best illustrated by 'medical' cases where sexual activity is obtained under the pretence that medical treatment is being performed.

In *R v Stanton*<sup>526</sup> the defendant informed the complainant that he was giving her an injection but proceeded to have intercourse with her instead. The court insisted on the element of force in rape and directed the jury that, since the defendant had not intended to procure sexual intercourse with the complainant by force, they should acquit him on a charge of assault with intent to commit rape. The decision in *Stanton* is not consistent with Kantian autonomy because, according to Kant, a person is treated as mere means whenever they are treated in a

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<sup>523</sup> Ibid, 24.

<sup>524</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 101.

<sup>525</sup> This has been overruled by *Dica* [2004] EWCA Crim.

<sup>526</sup> (1844) 1 Car & K 415.

way to which she could not possibly consent.<sup>527</sup> Korsgaard argues that ‘if an action depends upon force or deception or coercion, it is impossible for me to consent to it’.<sup>528</sup> The defendant in *Stanton* violated the complainant’s sexual autonomy because he did not treat her humanity as an end, which in turn resulted in him not respecting her right to use her own reason to determine whether to engage in sexual intercourse.

A different approach was adopted in *R v Case*,<sup>529</sup> where the defendant engaged in sexual intercourse with a 14-year old complainant on the pretext that he was curing her suppressed menstruation. The complainant, believing that she was submitting to medical treatment, offered no resistance. Wilde CJ concluding that there was no consent, drawing the distinction between submission to sexual intercourse and submission to medical treatment. He states that:

[S]he submits under a misrepresentation that it was some act necessary and proper for her cure; she made no resistance to an act which she supposed to be quite different from that which was done, and therefore, that which was done was done without her consent.<sup>530</sup>

The decision in *Case* is not consistent with a Kantian approach to the protection of sexual autonomy in that sexual intercourse becomes rape where the complainant does not consent. Since the Formula of Autonomy (FA) focuses on individuals being the potential legislators of laws valid for all rational beings, the complainant in *Case* was deprived of deciding for herself because her consent was based on the defendant’s fraud. Moreover, her capacity for self-legislation did not include the capacity to form judgments. The defendant in *Case*, by resorting to fraud in order to procure sexual intercourse, did not respect her as an autonomous self-governing agent.

It is not clear from the evidence in *Case* whether the complainant was aware of the physical nature of the ‘medical treatment’. This question was addressed in *R v Flattery*,<sup>531</sup> where the

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<sup>527</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 92.

<sup>528</sup> Korsgaard (n444), 295-96.

<sup>529</sup> (1850) 4 Cox CC 220.

<sup>530</sup> *R v Case* (1850) 4 Cox CC 223.

<sup>531</sup> (1877) 2 QBD 410.

complainant submitted to intercourse believing that the defendant was treating her medically. The defendant had obtained the complainant's submission fraudulently. Kelly CB rejected the argument that the onus was on the prosecution to prove that the complainant did not know the nature of the sexual act when submitting to medical treatment. He states:

I know no ground in law for such a proposition. And, even if she had such knowledge, she might suppose that penetration was being effected with the hand or with an instrument. The case is therefore not within the authority of those cases which have decided, decisions which I regret, that where a man by fraud induces a woman to submit to sexual intercourse, is not rape.<sup>532</sup>

On the facts, it was established that the complainant was under the impression that the defendant was performing a surgical operation by 'the hand or with an instrument'.<sup>533</sup> However, Kelly CB indicated that it would have made no difference had she known that an act of sexual intercourse was taking place. According to Field J, '[t]he question is one of consent, or not consent; but the consent must be to sexual connection. There was here no such consent.'<sup>534</sup>

*Flattery* appears to be consistent with Kantian autonomy in that it extends the protection of sexual autonomy to cases where the complainant only agreed to sexual intercourse because of deception on the part of the defendant. The defendant's maxims cannot be universalised without contradiction. He did not respect the complainant as an equal autonomous agent. The complainant was deprived of the opportunity to exercise her free will, which has the capacity to initiate its own actions. In order for a complainant to have freedom of the will, she must have a capacity for choice, which is independent of external influences such as deception by the defendant.

Williams contends that there is a 'great factual difference between the violently resisting or the terrified complainant 'in the ordinary case of rape'<sup>535</sup>, and the woman who happily

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<sup>532</sup> *R v Fletcher* (1877) 2 QBD 410, 413.

<sup>533</sup> *Ibid*, 413.

<sup>534</sup> *R v Fletcher* (1877) 2 QBD 410, 414.

<sup>535</sup> G. Williams, *Textbook of Criminal Law* (2<sup>nd</sup> edn, Steven & Sons 1983), 561.

submits because she has been deceived'.<sup>536</sup> It is argued that Williams' reasoning does not accord with Kantian autonomy in relation to the protection of sexual autonomy. According to Williams, only fundamental errors as to the nature of the act are capable of vitiating consent.<sup>537</sup> This opinion can be contrasted with the view advanced by Gardener and Shute in which they assert that rape is wrong because the rapist objectifies his victims. In their example, discussed in chapter two, Gardener and Shute adopt a Kantian view to support their claim that 'rape is the sheer use of another person'.<sup>538</sup> Williams' strict interpretation of the 'nature of the act' approach can be seen in his opinion of the Court of Appeal's decision in *R v Williams*,<sup>539</sup> where the defendant had sexual intercourse with the complainant under the pretence that her breathing was not quite right, and that he had to perform an operation to enable her to improve her voice. The complainant submitted to what was done under the belief, wilfully and fraudulently induced by the appellant, that she was being medically and surgically treated by the appellant, and not with any intention that he should have sexual intercourse with her. Williams argues that if the complainant:

[K]new of the facts of life and was willing to be persuaded that one of the benefits of the act of sex was an improvement in breathing, then she did not mistake the nature of the act, even though in her innocence she may not have realised that the man's motives had nothing to do with singing.<sup>540</sup>

A Kantian model of autonomy provides a more effective method of protection in cases such as *Williams*, because it disregards whether the complainant was aware of the nature of the act. A Kantian model focuses on whether the complainant is being used as a mere means and also whether her capacity to self-legislate has been undermined by the defendant's fraud. However, the 1956 legislation did not take this approach. For example, s 3(1), SOA 1956, dealing with an offence similar to rape, provided that:

It is an offence for a person to procure a woman, by false pretences or false representations, to have unlawful sexual intercourse in any part of the world.

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<sup>536</sup> Ibid.

<sup>537</sup> Ibid.

<sup>538</sup> Gardner and Shute (n125), 16.

<sup>539</sup> [1923] 1 KB 340.

<sup>540</sup> Williams (n535), 562.

This provision was passed to combat the 'white slave trade'.<sup>541</sup> Although this statutory offence overlaps with rape, pretences may be committed by words or conduct but they are not limited to pretences as to the nature of the act or the identity of the person.<sup>542</sup> Williams argues that that an omission to disclose facts under s 3, however important, should not be classed as fraud.<sup>543</sup> He justifies his criticism of s 3 on the basis that:

It can hardly be supposed that any boastful lie told by a man (even if told expressly) makes him guilty of the offence if the lie procures the woman's consent to intercourse. How many men have caused a woman to yield by deceitfully saying 'I love you'?<sup>544</sup>

Misleading a complainant in relation to an issue which affects her decision-making process with regards to whether to engage in a sexual activity or not, may amount to a violation of the complainant's sexual autonomy within a Kantian framework. Therefore, the issue which needs to be examined is how the complainant understood the act that she was consenting to.<sup>545</sup> As Herring notes, 'deceit, as much as force and threats, can negate consent',<sup>546</sup> because deceit, in a similar way to violence, 'manipulates people into acting against their will'.<sup>547</sup> Restricting the information on which a complainant makes a choice regarding sexual activity with another inhibits her free choice. Herring states that:

In sexual relations, people are entitled to expect their partners not to consider solely their own interests but rather engage in a cooperative and mutually beneficial relationship. We are therefore entitled to expect sexual partners to owe each other heightened standards of obligation of a fiduciary nature.<sup>548</sup>

Herring's approach is consistent with Kantian autonomy. Deception is considered impermissible within a Kantian framework, because it hinders the decision-making process of a complainant and manipulates her rational capacities; it manipulates people into acting

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<sup>541</sup> Ibid.

<sup>542</sup> Ibid.

<sup>543</sup> Ibid.

<sup>544</sup> Ibid, 562-563.

<sup>545</sup> Herring, 'Mistaken Sex' (n11), 514.

<sup>546</sup> Ibid, 512.

<sup>547</sup> Ibid, 515.

<sup>548</sup> Ibid.



against their will.<sup>549</sup> In other words, it restricts the options available to the complainant and thereby limits her choices and denies her the freedom to self-legislate. In relation to decision-making, Herring argues that:

In order for a decision to carry the weight we expect of autonomy we need to ensure that the decisionmaker [sic] is aware of the key facts involved in making the decision; that the decisionmaker [sic] is able to make a choice; and the decision-maker is free from illegitimate pressure.<sup>550</sup>

A complainant who is not free from illegitimate pressure because her will is subject to another is heteronomous. As stated in chapter two, Kant contrasted a heteronomous being with the autonomous individual whose actions are self-willed through the power of reason.

#### Fraud as to the identity of the person

Prior to the SOA 2003, the law of sexual offences faced a recurring problem as to whether fraud as to the identity of the person performing sexual intercourse vitiated consent. In a series of cases starting with *R v Jackson*,<sup>551</sup> and culminating in *R v Barrow*,<sup>552</sup> it was held that obtaining sexual intercourse by impersonation of a woman's husband was not rape. The *Barrow* line of decisions was reversed by s 4 of the Criminal Law Amendment Act 1885. This was also declared to be the position by s 1(2), SOA 1956, which stated that 'a man who induces a married woman to have sexual intercourse with him by impersonating commits rape'. This provision was limited to impersonating the complainant's husband. It did not go far enough in terms of protecting sexual autonomy because it failed protect the unmarried complainant. The advantage of implementing a Kantian model to protect sexual autonomy in such cases is that it does not distinguish between married and unmarried complainants as it is concerned with treating a person not merely as a means but an end in themselves.

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<sup>549</sup> S. Bok, *Lying: Moral Choice in Public and Private Life* (Harvester Press 1978), 43.

<sup>550</sup> Herring, 'Mistaken Sex' (n11), 516.

<sup>551</sup> (1822) Russ & Ry 487.

<sup>552</sup> (1868) 11 Cox CC 191.

However, in *R v Elbekkay*,<sup>553</sup> the Court of Appeal recognised for the first time that a mistaken belief as to the identity of the defendant included partners other than a spouse.<sup>554</sup> In this case the complainant was awakened by someone whom she assumed was her boyfriend coming into her bed. Without opening her eyes she proceeded to have sexual intercourse with the defendant and after 20 minutes she opened her eyes and saw that it was not her boyfriend. The Court of Appeal decided it was very unlikely that Parliament was deliberately and consciously deciding that it was rape to impersonate a husband but not, for example, a man who had been living with the complainant for many years. The Court of Appeal further held that the situation had been affected by s 1 of the SOAA 1976, whereby a man commits rape where he has unlawful sexual intercourse with a woman who, at the time of the intercourse, does not consent to it. This statutory provision is consistent with Kantian autonomy because it focuses on respecting the humanity of others. Therefore, the issue was whether the complainant consented. The Court of Appeal agreed with the trial judge that it would be extraordinary to conclude that it is rape to impersonate a husband but not a ‘partner’ of the complainant concerned. This decision is consistent with Kantian autonomy because it focuses on whether the defendant’s actions limit the complainant’s choices in relation to deciding whether to agree to sexual intercourse. A Kantian model views impersonation as another form of deception and, therefore, impersonations would be considered a violation of Kantian autonomy.

The decision in *Elbekkay* appears to have followed the 1984 recommendations of the Criminal Law Revision Committee (CLRC); namely that consent obtained by impersonating another man should be included amongst the cases where consent obtained by fraud amounts to rape.<sup>555</sup> Unfortunately, Parliament did not take the opportunity (when amending the definition of rape in 1994) to widen the husband-impersonation rule so that it extends to all cases. Section 142 of the CJPOA 1994<sup>556</sup> amended the definition of rape (which was previously contained in s 1(1) of the SOA 1956) so that it became an offence for a man to

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<sup>553</sup> [1995] Crim LR 163.

<sup>554</sup> It is not clear from the judgement whether there was a deliberate fraud on the part of the defendant in *Elbekkay*.

<sup>555</sup> Criminal Law Revision Committee, *Fifteenth Report: Sexual Offences* (Cmnd 9213, 1984), para 2.102.

<sup>556</sup> This Act completed its Parliamentary passage on 25 October 1994 and received Royal Assent on 3 November 1994.

rape a woman or another man. Therefore, protection of sexual autonomy was made available to a wider class of complainants. Moreover, the definition of rape in the CJPOA 1994 omitted the word ‘unlawful’, which appears in the former definition of rape contained in s 1 of the SOAA 1976 and in the common law definition of the offence. Thus, at common law, rape could not be committed by a husband against his wife as she was presumed to have consented to all acts of intercourse upon marriage. This exemption did not protect a married complainant’s sexual autonomy because she is denied the freedom and choice to decide for herself whether to engage in a sexual act. In relation to husband-impersonation, s 1(2) of the SOA 1956 was reproduced in s 1(3) of the 1956 Act, when the definition of rape was amended by s 142(3) of the CJPOA 1994. According to s 1(3), ‘a man also commits rape if he induces a married woman to have sexual intercourse with him by impersonating her husband’. The 1994 Act may have implicitly overruled *Elbbekay* by excluding from the new s 1(3) of the SOA 1956 any reference to impersonations other than a husband and thereby providing limited protection of sexual autonomy. This was an unfortunate development because it is not consistent with a Kantian notion of autonomy because it fails to respect the dignity of the individual.

## Conclusion

This chapter has examined whether the previous law relating to sexual offences adequately protected sexual autonomy. The purpose of this analysis was to determine whether the previous law protected sexual autonomy more effectively than a Kantian model. It has been shown that the previous law underwent various developments to protect sexual autonomy. The main development, in terms of protecting sexual autonomy, occurred in the case of *Camplin*,<sup>557</sup> where the court moved towards a consent-centric model in relation to the protection of sexual autonomy. This focus afforded more protection due to the fact that the prosecution was not required to prove that sexual activity occurred ‘against her will’. This approach fails to adequately protect sexual autonomy because it does not allow for the fact that violation of sexual autonomy can be carried out by means other than force, such as fraud, non-violent coercion and where the complainant is asleep. However, the decision in *Camplin*

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<sup>557</sup> *Camplin* (1845) 1 CAR & K 746.

was not universally followed. This was demonstrated by the decisions in *Dimes*,<sup>558</sup> *Harling*,<sup>559</sup> and *Howard*.<sup>560</sup> The courts in these cases held that it was for the prosecution to prove that sexual intercourse took place against the complainant's will. This approach clearly failed to adequately protect sexual autonomy. A non-consent centric model fails to adequately protect sexual autonomy because it does not take into account that sexual autonomy can be violated by means other than force.

The sexual offences law prior to the SOA 2003 failed to provide a statutory definition for the meaning of consent. Consequently, it was left to the courts to provide a definition in relation to consent. The defendant in *Olugboja* was convicted of rape and appealed on the basis that rape required that the submission of the complainant be induced by force or the threat of force.

Dunn LJ's dictum in *Olugboja* is problematic because if 'every consent involves a submission', it can hardly be said that a person who voluntarily agrees to sexual activity with her sexual partner is surrendering to her partner, when she is in fact agreeing to something which she desires. Submission, on the other hand, suggests that there is an external constraint affecting her decision. It appears incorrect to suggest that every consent involves a submission.

The old law focused on whether the complainant had resisted, rather than the actions of the defendant, and as a result did not adequately protect sexual autonomy. The decisions in *Camplin* and *Olugboja* focused on the state of mind of the complaint and as a result provided more adequate protection. However, the lack of an accepted definition of the meaning of 'consent' may result in uncertainty as a result of the jury's interpretation of the meaning of consent.

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<sup>558</sup> (1912) 7 Cr App R 43.

<sup>559</sup> (1938) 26 Cr App R 127.

<sup>560</sup> (1966) 50 Cr App R 56.

## Chapter Four: The Current Law of Sexual Offences in England & Wales

### Introduction

This chapter will critically examine the current law of sexual offences to determine whether it is consistent with Kantian autonomy. In 1999, the law of sexual offences underwent a comprehensive review, which resulted in significant reforms brought in by the Sexual Offences Act 2003 (SOA 2003). As stated in chapter three, prior to the SOA 2003, the law relating to sexual offences was primarily located in the Sexual Offences Act 1956 (SOA 1956). Many of the provisions within this Act dated back as far as the nineteenth century and consequently were in need of modernisation. The SOA 2003 was the product of two reviews in the area of sexual offences. The first involved a review of sexual offences by the Home Office which led to the publication of a report entitled *Setting the Boundaries*.<sup>561</sup> The second review focused on the Sex Offenders Act 1997. The main recommendations of both reviews were taken forward to a White Paper entitled *Protecting the Public*, which described the law as ‘archaic, incoherent and discriminatory’.<sup>562</sup>

### A Consent-centric model

In considering the rights and responsibilities of individuals to make their own decisions about consensual sexual behaviour, the Sex Offences Review (SOR) noted that ‘the law should not intrude on consensual sexual behaviour between those over the age of consent without good cause’.<sup>563</sup> According to the SOR:

Consent is the crucial issue for these offences<sup>564</sup> because the lack of consent is the essence of the criminal behaviour. It is one individual forcing another to undergo an experience against their will. It is a violation of the victim’s autonomy and

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<sup>561</sup> Home Office, *Setting the Boundaries* (n26).

<sup>562</sup> Home Office, *Protecting the Public* (n25).

<sup>563</sup> Home Office, *Setting the Boundaries* (n26), para 1.3.2.

<sup>564</sup> *Ibid*, para 2.1.

freedom to decide how and with whom she (or he) would want to share any kind of sexual experience.<sup>565</sup>

The SOR recommended that ‘consent’ should be defined as ‘free agreement’<sup>566</sup> and also recommended that the law set out a non-exhaustive list of circumstances where consent was absent.<sup>567</sup> These recommendations were incorporated into the SOA 2003.

Chapter three documented that, prior to the SOA 2003, ‘consent’ in the context of sexual offences was not defined by statute. Instead, the courts gave the word consent its ordinary meaning, which was a matter for the jury to determine. It has been shown that the Court of Appeal in *R v Olugboja*<sup>568</sup> held that it was up to the jury to decide in each individual case whether the complainant had consented to sexual intercourse. According to the Court, the material question was whether the complainant consented in the ‘ordinary meaning’<sup>569</sup> of consent and ‘every consent involves a submission, but it by no means follows that a mere submission involves consent’.<sup>570</sup> However, the decision in *Olugboja* was considered problematic as it did ‘little to increase the protection of sexual autonomy’.<sup>571</sup> By virtue of s 74 of the SOA 2003, a person consents ‘if he agrees by choice, and has the freedom and capacity to make that choice’. It is implicit in this definition that consent can only be given by the person in question and not by a third party on her behalf.<sup>572</sup> Section 74 which is supplemented in certain circumstances by ‘evidential’<sup>573</sup> and ‘conclusive’<sup>574</sup> presumptions has been criticised because:

“[F]reedom” and “choice” are ideas which raise philosophical issues of such complexity as to be ill-suited to the needs of criminal justice – clearly those words

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<sup>565</sup> Ibid.

<sup>566</sup> Ibid, para 2.10.5.

<sup>567</sup> Ibid, paras 2.10.5-2.10.6.

<sup>568</sup> *R v Olugboja* [1982] QB 320.

<sup>569</sup> Ibid, 332.

<sup>570</sup> Ibid.

<sup>571</sup> Temkin, *Rape and the Legal Process* (402), 93.

<sup>572</sup> Card *et al* (n30), para 3.13.

<sup>573</sup> SOA 2003, s 75.

<sup>574</sup> SOA 2003, s 76.

do not refer to total freedom of choice, so all the questions about how much liberty of actions satisfies the “definition” remains at large.<sup>575</sup>

Tadros also raises concerns regarding s 74 by arguing that:

On the one hand, the definition supposes that it is possible for a person to agree by choice whilst lacking capacity or freedom. Otherwise the second part of the definition would appear to be redundant. It would only be necessary to define consent as an agreement made by choice with capacity and freedom if there was the possibility that an agreement might be made by choice without the capacity and freedom. But, on the other hand, the definition suggests that if one lacks capacity and freedom one cannot agree by choice at all. For the definition suggests that one must have the capacity and freedom to make that choice.<sup>576</sup>

Tadros suggests that the definition implies that:

The complainant might have agreed by choice and yet lacked the capacity and freedom to make that choice, which is paradoxical. Are the jury to determine whether the complainant agreed by choice first, and then determine whether she had the relevant capacity and freedom? Or are they to address the question of capacity and freedom first and, if either capacity or freedom are lacking, conclude that she did not agree by choice?<sup>577</sup>

The above criticism highlights that ‘agreement’, ‘choice’ and ‘freedom’ are complex philosophical concepts and they are not easily defined. However, Tadros’ criticism does not take into account the fact that, in order to agree by choice, the complainant must have the freedom and capacity to make that particular choice. Where the complainant lacks either freedom or choice, then her agreement will not be valid and she cannot be said to have

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<sup>575</sup> J. Temkin and A. Ashworth ‘The Sexual Offences Act 2003: (1) Rape, sexual assaults and the problems of consent’ [2004] Crim LR 328., 336.

<sup>576</sup> V. Tadros, ‘Rape Without Consent’ (2006) 26 OJLS 515, 521.

<sup>577</sup> Ibid.

consented under s 74. The definition in s 74 is more comprehensive than the SOR's recommendation which was that consent should be defined as 'free agreement'.<sup>578</sup>

Chapter two established that the Categorical Imperative (CI) requires a person to act in a manner which respects other individuals' existence as ends in themselves, rather than simply as means to an end.<sup>579</sup> Kantian autonomy is based on the freedom of the will to choose. It is the capacity to act on rational principles and 'freely to exercise the moral reasoning will, through the freedom of choice'.<sup>580</sup> It is submitted that the definition of consent in s 74 is consistent with Kantian autonomy, but it does not provide definitions of philosophical concepts such as 'freedom' and 'choice'. The absence of definitions regarding these complex philosophical concepts may result in uncertainty when s 74 is applied in a practical context.

Elliot and de Than argue that the core value which consent should protect in a society which respects Western liberal ideals is personal autonomy.<sup>581</sup> The authors write that:

Autonomy has both positive and negative aspects, the positive being represented in freedom to seek out and engage in relations with other individuals, and the negative in the right to refuse relations with others and have effect given to that refusal.<sup>582</sup>

While the above refers to the concept of autonomy in general, it can also be extended to sexual autonomy. In order to be consistent with Kantian autonomy the two aspects of sexual autonomy must also include the caveat that a person must never treat herself and others simply as a means but always as an end.<sup>583</sup>

### Agreement by choice

Section 74 follows the recommendation of the SOR which stated that 'any free agreement would necessarily be voluntary and genuine'.<sup>584</sup> The SOR felt that 'free agreement' to define

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<sup>578</sup> Home Office *Setting the Boundaries* (n26), para 2.10.

<sup>579</sup> Page 56.

<sup>580</sup> Treiger-Bar-Am (n102), 555.

<sup>581</sup> Elliott and de Than (n42), 231.

<sup>582</sup> Ibid.

<sup>583</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 91.

<sup>584</sup> Home Office, *Setting the Boundaries* (n26), para 2.10.5.



consent would assist in clarifying the issue that the absence of protest, resistance or injury would not necessarily mean that the complainant consented to sexual activity. It also serves to highlight the fact that a complainant who utters no protest and offers no physical resistance may not have consented.<sup>585</sup> The SOR noted that the Oxford dictionary defined the verb ‘to consent’ as ‘to acquiesce, or agree’ and the noun ‘consent’ as ‘voluntary agreement, compliance or permission’.<sup>586</sup> It concluded that:

These definitions cover a range of behaviour from whole-hearted enthusiastic agreement to reluctant acquiescence. In this context the core element is that there is an agreement between two people to engage in sex. People have devised a complex set of messages to convey agreement and lack of it – agreement is not necessarily verbal, but it must be understood by both parties. Each must respect the right of the other to say “no” – and mean it.<sup>587</sup>

The SOR’s recommendation of ‘free agreement’ was based on the argument that it not only allowed for simplicity and clarity but also included all the necessary ingredients.<sup>588</sup> The complainant’s agreement can be expressed or implied, and may be evidenced by words or conduct, past or present.<sup>589</sup> This also applies to the complainant’s refusal to consent to sexual activity. Evidence of this is found in *R v Malone*,<sup>590</sup> later confirmed by the Court of Appeal in *R v Hysa*,<sup>591</sup> where it was stated that ‘there is no requirement that the absence of consent has to be demonstrated or that it has to be communicated to the defendant for the *actus reus* of rape to exist’.<sup>592</sup> The court in *Malone* stated that:

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<sup>585</sup> P. Rook and R. Ward, *Rook and Ward on Sexual Offences Law & Practice* (3<sup>rd</sup> edn, Sweet & Maxwell 2004), para 1.81.

<sup>586</sup> Home Office *Setting the Boundaries* (n26), para 2.10.4.

<sup>587</sup> Ibid.

<sup>588</sup> Home Office *Setting the Boundaries* (n26), para 2.10.5.

<sup>589</sup> Card *et al* (n30), para 3.19.

<sup>590</sup> [1998] 2 Cr App R 447.

<sup>591</sup> [2007] EWCA Crim 2056.

<sup>592</sup> Ibid, para 16.

It is not the law that the prosecution in order to obtain a conviction for rape have to show that the complainant was either incapable of saying no or putting up some physical resistance, or did say no or put up some physical resistance.<sup>593</sup>

There is no requirement to prove that the complainant said ‘no’ to the defendant, or that the complainant had not said ‘yes’. The analysis carried out by the courts under the previous law<sup>594</sup> will still be required when determining whether the complainant had consented under s 74.<sup>595</sup> Thus, Brooke LJ’s statement, in *R v McAllister*,<sup>596</sup> that the focus of the inquiry should be based on the sexual autonomy of the complainant also applies to the SOA 2003. However, the SOA 2003 does not shed light on situations involving a complainant whose agreement to sexual activity is based on promises of benefit, made by the defendant, which appeal to her particular tastes or weaknesses.<sup>597</sup> The SOA 2003 is silent on whether a complainant who agrees to sexual activity in order to satisfy her ambition, such as improving her financial situation is consenting under s 74. Although the concept of agreement is not used in Kant’s writing in relation to autonomy, Kantian autonomy involves independence from heteronomous factors. Lindley maintains that according to the Kantian view:

[T]o be fully autonomous is equivalent to being a fully rational agent. To be a fully rational agent is to be motivated by purely rational principles, which are untainted by particular inclinations or interests. Such purity requires that one act only on principles one is prepared to universalise in a strong sense. This in turn requires that one treat all human beings never simply as means to ends, but as ends in themselves (because it is impossible for a creature with a will to regard itself simply as a means to an end).<sup>598</sup>

With regards to personal inclinations, Kant argues that they are caused by events in the world.<sup>599</sup> Actions performed through the pursuit of inclinations are heteronomous, whereas

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<sup>593</sup> *R v Malone* [1998] 2 Cr App R 447.

<sup>594</sup> Sexual Offences Act 1956.

<sup>595</sup> It is important to note that *R v Malone* and *R v H*, were decided prior to the SOA 2003.

<sup>596</sup> [1997] Crim LR 233.

<sup>597</sup> The impact on factors such as the complainant’s interests, ambitions and social conditions on her decision to engage in sexual activity and whether such factors negative autonomy will be examined in chapter four.

<sup>598</sup> Lindley (n114), 20.

<sup>599</sup> *Ibid*, 22.

an individual can only be autonomous if her practical judgment has been untainted by inclinations.<sup>600</sup> Kant places the nominal<sup>601</sup> self outside of time and thereby freeing it from causal determination.<sup>602</sup> To be autonomous is to act on self-chosen principles, which are capable of being universalised without giving rise to contradictions. A complainant who engages in sexual activity in order to improve her prospects is not acting autonomously and therefore cannot be said to be agreeing to sexual autonomy under Kant's model of autonomy. Such a complainant would be using herself and the defendant simply as a means and not as an end. In such a case the Kantian model can be used to protect the complainant's sexual autonomy from being violated. The use of the word 'agreement' in s 74 is intended to emphasise that the absence of the complainant's resistance or injury does not necessarily signify her consent. However, there is ambiguity surrounding situations where the complainant, faced with a non-violent coercive threat to withhold some benefit she is not entitled to, submits to sexual intercourse.<sup>603</sup>

In order to protect sexual autonomy within a Kantian framework, the dynamics of the relationship between the parties would need to be examined. An individual's choice to engage in sexual activity must be free and unconstrained. Concealment of matters relevant to her choice, deception or coercion will have an impact on the authenticity of her agreement to consent to sexual activity. It has been suggested that 'choice' presupposes that the complainant has options to choose from, which in turn presupposes that the complainant is possessed of adequate information about each, in order to agree on a particular choice.<sup>604</sup> The concept of choice is unhelpful, and as argued by Elliot and de Than, 'unnecessarily complicates matters'.<sup>605</sup> Elliot and de Than write that the real issue is whether a person has the freedom and capacity to agree because 'when a person is consenting to something they are effectively agreeing to it'.<sup>606</sup> This argument is in line with the assumption that under s 74 there can be no valid 'agreement by choice' in the absence of freedom and capacity to make

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<sup>600</sup> Ibid, 23.

<sup>601</sup> Kant defines the objects of sensibility 'phenomena', while things as they are in themselves and as they are known through pure intellect he terms 'noumena'.

<sup>602</sup> A. Reath, 'Kant's Critical Account of Freedom' in G. Bird (ed), *A Companion to Kant* (Blackwell Publishing 2006), 287.

<sup>603</sup> The application of Kantian autonomy in such cases will be examined in Chapter Four.

<sup>604</sup> D. Ormerod, *Smith and Hogan's Criminal Law* (12<sup>th</sup> edn, OUP 2008), 675.

<sup>605</sup> Elliott and de Than (n42), 238.

<sup>606</sup> Ibid.

that choice.<sup>607</sup> Therefore, the word ‘choice’ is at best superfluous.<sup>608</sup> Temkin and Ashworth provide a hypothetical example in which a defendant deceives the complainant about his HIV status. The authors assert that ‘if C gives her agreement in ignorance of a key fact, and if D knows of that ignorance and takes advantage of it, it may be concluded that C did not agree by choice’.<sup>609</sup> However, *R v B*<sup>610</sup> established that, whilst the transmission of a disease is not consented to, the complainant’s consent to sexual intercourse is not vitiated. This decision ignores the possibility of Temkin and Ashworth’s hypothetical scenario.<sup>611</sup> According to Latham LJ in *R v B*:

Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act. However, the party suffering from the sexually transmissible disease will not have any defence to any charge which may result from harm created by that sexual activity, merely by virtue of that consent, because such consent did not include consent to infection by the disease.<sup>612</sup>

No rape charge will occur where a defendant conceals his HIV status. Sexual autonomy is not protected in such instances. The defendant in Temkin and Ashworth’s example is not acting in accordance with the CI because he cannot at the same time will, without contradiction, that his maxim should become universal law. The defendant in such a case fails to respect the complainant’s humanity by using her merely as a means. The reason for this is that maxims based on deceptions are impermissible according to Kantian autonomy.<sup>613</sup> The complainant’s sexual autonomy is being violated because her agreement is obtained by deception. She is not fully able to self-legislate because her decision-making is influenced by external factors, namely the defendant’s deception. Moreover, in order to comply with the formula of

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<sup>607</sup> Card *et al* (n30), para 3.16.

<sup>608</sup> Elliott and de Than (n42), 239.

<sup>609</sup> Temkin and Ashworth (n575), 344. The facts of *Dica* and *Konzani* mirror the hypothetical example provided by Temkin and Ashworth.

<sup>610</sup> [2007] 1WLR 1567.

<sup>611</sup> L. Cherkassky, ‘Being Informed: The Complexities of Knowledge, Deception and Consent when Transmitting HIV’ (2010) 74(3) J Crim L 242, 250.

<sup>612</sup> [2007] 1WLR 1567, 1571.

<sup>613</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 85.

autonomy, the defendant must also be subject to the law which he legislates.<sup>614</sup> Korsgaard writes that:

A person, an end in itself, is a free cause, which is to say a first cause. By contrast, a thing, a means, is a merely mediate cause, a link in the chain. A first cause is, obviously, the initiator of a causal chain, hence a real determiner of what will happen. The idea of deciding for yourself whether you will contribute to a given end can be represented as a decision whether to initiate that causal chain which constitutes your contribution. Any action which prevents or diverts you from making this initiating decision is one that treats you as a mediate rather than a first cause; hence a mere means, a thing, a tool. Coercion and deception both do this.<sup>615</sup>

The defendant, when deceiving the complainant, manipulates her reason and prevents her from formulating a decision which is free from external constraints. His deception treats her reason as an object. The Formula of Humanity's (FH) prohibition against any form of lying can be applied to deceptions.<sup>616</sup> Kantian autonomy can be applied to support Herring's argument<sup>617</sup> regarding deception and rape.<sup>618</sup> Herring's argument will be explored in more detail in chapter four. Kant uses humanity to refer to the capacity to determine ends through rational choice.<sup>619</sup> In relation to this capacity, Korsgaard writes that:

Imperfect duties arise from the obligation to make the exercise, preservation, and development of this capacity itself an end. The perfect duties – that is, the duties to justice, and, in the realm of ethics, the duties of respect – arise from the obligation to make each human being's capacity for autonomous choice the condition of the value of every other end.<sup>620</sup>

In relation to deception, Kant writes:

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<sup>614</sup> Ibid, 101.

<sup>615</sup> Korsgaard (n444), 141.

<sup>616</sup> Ibid, 137.

<sup>617</sup> Discussed in Chapter One.

<sup>618</sup> Kant, *The Metaphysics of Morals* (n255), 195.

<sup>619</sup> Ibid.

<sup>620</sup> Korsgaard (n444), 137.

[T]he man who has a mind to make a false promise to others will see at once that he is intending to make use of another man merely as a means to an end he does not share. For the man whom I seek to use for my own purposes by such a promise cannot possibly agree with my way of behaving to him, and so cannot himself share the end of the action.<sup>621</sup>

Individuals cannot assent to a way of acting when they are given no chance to do so.<sup>622</sup> In cases of deception and coercion, the complainant cannot agree to sexual activity because the defendant's actions are preventing her from choosing for herself. Therefore, the issue of whether a complainant can assent to the defendant's way of acting can serve as a criterion for judging whether the defendant is treating the complainant as a mere means.<sup>623</sup> Knowledge of the events and some power over the proceedings are the conditions of possible assent; without these, the concept of assent does not apply.<sup>624</sup>

According to the FH, coercion and deception are the most fundamental forms of wrongdoing to others.<sup>625</sup> They violate the conditions of possible assent because they prevent others from choosing to agree. The concept of agreement in s 74 is consistent with a Kantian notion of autonomy. The following section will critically analyse the concepts of freedom and capacity in order to determine to what extent they are consistent with Kantian autonomy and also whether there are any barriers to their practical application.

### Freedom and capacity

In Kant's work, autonomy is treated as pivotal for human freedom and morality.<sup>626</sup> Kant views autonomy, or self-governance by universal law, as the condition that is necessary to achieve and maintain freedom. This involves the independence of the choices and actions of an individual not only from influence by others but also from domination by her own inclinations. Guyer claims that autonomy cannot merely be equated with freedom of the will.

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<sup>621</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 92.

<sup>622</sup> Korsgaard (n444), 138.

<sup>623</sup> Ibid, 139.

<sup>624</sup> Ibid.

<sup>625</sup> Ibid, 140.

<sup>626</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 95.

He argues that autonomy ‘must be understood as the aim that a person with free will must adopt in an ordinary sense, which is something such an agent ought to do, and can do, but does not necessarily do’.<sup>627</sup> Therefore, it is necessary to examine Kant’s interpretation of freedom in relation to his conception of autonomy in order to determine whether ‘freedom’ in s 74 is consistent with Kantian autonomy.

### *Kantian notion of freedom*

In his lectures on moral philosophy, Kant defines freedom as ‘the capacity which confers unlimited usefulness on all others’.<sup>628</sup> He is noted to have stated that freedom involves employing the power an individual has ‘to rule over his strong inclinations’.<sup>629</sup> Kant does not mean that inclinations should be abolished, merely that they should be regulated.<sup>630</sup> He states that freedom ‘consists in this, that everyone can act according to his own will, without being necessitated to act according to the will of another’.<sup>631</sup> Thus, Kant suggests a bipartite account of freedom in choice and action.<sup>632</sup> The principle of autonomy can be used to regulate an individual’s pursuit of the satisfaction of inclinations.<sup>633</sup> This principle of autonomy considers ‘every human will is a will which by all its maxims enacts universal law’.<sup>634</sup> Thus, all of an individual’s maxims must be part of a system of universal law.<sup>635</sup> This argument connects the two parts of Kant’s bipartite conceptualisation of freedom by highlighting that the avoidance of domination by the individual’s inclinations and the avoidance of domination by others are not independent goals.<sup>636</sup>

For Kant, autonomy is an ideal in which ‘its exercise is towards realisation’.<sup>637</sup> This exercise derives from the primary unconditionality of the capacity which is universally held.<sup>638</sup> The

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<sup>627</sup> P. Guyer, ‘Kant on the Theory and Practice of Autonomy’ in E. F. Paul, F. D. Miller, Jr. and J. Paul (eds) *Autonomy* (CUP 2003), 72.

<sup>628</sup> Kant, *Lectures on Ethics* (n21), 237.

<sup>629</sup> Ibid.

<sup>630</sup> I. Kant, *Religion Within the Boundaries of Mere Reason*, Wood, A. and Di Giovanni, G. (trans.) (CUP 1998), 6: 4.

<sup>631</sup> Kant, *Lectures on Ethics* (n21), 238.

<sup>632</sup> Guyer ‘Kant on the Theory and Practice of Autonomy’ (n627), 72.

<sup>633</sup> Ibid, 76.

<sup>634</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 94.

<sup>635</sup> Guyer ‘Kant on the Theory and Practice of Autonomy’ (n627), 75.

<sup>636</sup> Ibid.

<sup>637</sup> Treiger-Bar-Am (n102), 563.

<sup>638</sup> Ibid.

essence of autonomy ‘is the unconditional capacity that allows its exercise’.<sup>639</sup> Choice which can be determined by pure reason is called ‘free choice’.<sup>640</sup> ‘Human choice’<sup>641</sup> is distinguished from ‘animal choice’<sup>642</sup> in that the latter requires a ‘capacity for choice than can indeed be affected but not determined by impulses’.<sup>643</sup> Kant states that freedom of choice:

[I]s this independence from being determined by sensible impulses; this is the negative concept of freedom. The positive concept of freedom is that of the capacity of pure reason to be of itself practical. But this is not possible except by the subjection of the maxim of every action to the condition of its qualifying as universal law.<sup>644</sup>

Therefore, the negative concept of the freedom of *Wilkur* is independence from determination by sensuous impulses whereas the positive concept is defined as ‘the capacity of pure reason to be of itself practical’.<sup>645</sup> Kant draws a similar contrast in the *Groundwork*, where the positive concept of freedom is identified with autonomy.<sup>646</sup> While *Wilkur* is negative freedom, *Wille* is freedom of the will in the positive sense.<sup>647</sup> Treiger-Bar-Am writes that:

Wilkur is freedom from external, heteronomous constraints; Wille is freedom to self-legislate. Choice by Wilkur is directed by the rational will, the Wille. The Wilkur is the executive function of the will and the Wille is the legislative functions.<sup>648</sup>

*Wille* involves the capacity to self-legislate while *Wilkur* is the capacity to choose good or evil.<sup>649</sup> With regards to the relationship between freedom and autonomy, Kant asks ‘[w]hat else then can freedom of will be but autonomy – that is, the property which will has of being

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<sup>639</sup> Ibid.

<sup>640</sup> Kant, *The Metaphysics of Morals* (n255), 42.

<sup>641</sup> Ibid.

<sup>642</sup> This is determined by inclination only.

<sup>643</sup> Kant, *The Metaphysics of Morals* (n255), 42.

<sup>644</sup> Ibid.

<sup>645</sup> Treiger-Bar-Am (n102), 563.

<sup>646</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 97-8.

<sup>647</sup> Treiger-Bar-Am (n102), 563.

<sup>648</sup> Treiger-Bar-Am (n102), 564.

<sup>649</sup> Ibid.



a law to itself'.<sup>650</sup> Guyer suggests that Kant's intended answer to this question is clearly that the freedom of the will cannot be anything other than autonomy.<sup>651</sup> However, Kant came to retract this thesis that freedom of the will entails autonomy.<sup>652</sup> This retraction was made in *The Critique of Practical Reason* where he writes that:

Since the mere form of a law can be thought only by reason and is consequently not an object of the senses and therefore does not belong among appearances, the conception of this form as the determining ground of the will is distinct from all determining grounds of events in nature according to the law of causality, for these grounds must themselves be appearances. Now, as no determining ground of the will except the universal legislative form [of its maxim] can serve as a law for it, such a will must be conceived as wholly independent of the natural law of appearances in their natural relations, i.e. the law of causality. Such independence is called freedom in the strictest, i.e., transcendental, sense. Therefore, a will to which only the law-giving form of the maxim can serve as a law is a free will.<sup>653</sup>

Guyer argues that this clearly implies that freedom of the will is a necessary condition for autonomy, 'but not that it is a sufficient condition for autonomy or that it necessarily entails it'.<sup>654</sup> Guyer argues that Kantian autonomy must be viewed:

[A]s a condition of mastery over our inclinations in our choice of ends and actions. Only an individual's self-regulation of inclinations in accordance with the Kantian autonomy, which requires freedom from domination by her own inclinations and by others.<sup>655</sup>

Although freedom and autonomy appear closely connected, freedom appears more closely connected with not being constrained by internal and external conditions. Kantian autonomy, on the other hand, relates to self-legislation and independence from heteronomous factors.<sup>656</sup>

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<sup>650</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 105.

<sup>651</sup> Guyer, 'Kant on the Theory and Practice of Autonomy' (n627), 77.

<sup>652</sup> Ibid, 78.

<sup>653</sup> Kant, *Critique of Practical Reason* (n285), 28-9.

<sup>654</sup> Guyer, 'Kant on the Theory and Practice of Autonomy' (n627), 78.

<sup>655</sup> Ibid, 88.

<sup>656</sup> Kant, *Critique of Pure Reason* (224), 377.

However, this is only the negative definition of autonomy, as negative freedom.<sup>657</sup> Kantian autonomy as positive freedom is the capacity to self-legislate.<sup>658</sup> This suggests that Kant's conception of freedom not only relates to an individual's freedom from something but also freedom to act on maxims which accord with the CI. As previously noted, a free will is a will under moral law because according to Kant the principle 'to act on no other maxim than that which can also have as object itself as a universal law'.<sup>659</sup> This, Kant asserts, is the formula of the CI and the principle of morality.<sup>660</sup> It follows that Kantian autonomy is the capacity to act on rational principles and to exercise moral reasoning through freedom of choice.<sup>661</sup> A free will and a will subject to moral law are one and the same, according to Kant.<sup>662</sup> Sandel argues that '[a]cting freely, that is autonomously, and acting morally, according to the categorical imperative, are one and the same'.<sup>663</sup>

In *Protecting the Public*, the Government stated that it intended to create a statutory provision in relation to consent that is 'clear and unambiguous'.<sup>664</sup> Critics of s 74 argue that broad notions of 'choice' and 'freedom' leave a 'good many questions unanswered about the kinds of non-violent threats or other pressures that might invalidate an apparent consent'.<sup>665</sup> While s 74 provides juries with more guidance than the *Olugboja* direction, they will still have to assess a wide range of factors when the complainant's freedom is uninhibited by non-violent factors such as threats to terminate her employment.<sup>666</sup> The definition of consent does not provide any guidance to juries in relation to a complainant who submits in order to advance her career or reputation.<sup>667</sup> Similarly, Rook and Ward state that the 'concept of "free agreement"' is capable of a wide interpretation and ultimately it would be for the juries to decide its boundaries'.<sup>668</sup> The Judicial Studies Board has published *Illustrations* to assist

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<sup>657</sup> Treiger-Bar-Am (n102), 560.

<sup>658</sup> Discussed in Chapter One.

<sup>659</sup> Kant, *The Metaphysics of Morals* (n255), 52.

<sup>660</sup> Ibid, 52-3.

<sup>661</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 101.

<sup>662</sup> Ibid, 108.

<sup>663</sup> Sandel (n86), 124.

<sup>664</sup> Home Office *Protecting the Public* (n25), para 30.

<sup>665</sup> I. Dennis, 'The Sexual Offences Act' [2004] Crim LR 79, 79; Temkin and Ashworth (n2); J. Elvin, 'The Concept of Consent under the Sexual Offences Act 2003' (2008) 72(6) J Crim L 72, 519, 523; Ormerod, *Smith and Hogan's Criminal Law* (n604), 675.

<sup>666</sup> Ormerod *Smith and Hogan's Criminal Law* (n604), 675.

<sup>667</sup> Card *et al* (n30), para 3.35.

<sup>668</sup> Rook and Ward (n585), para 1.84.

juries regarding the meaning of consent. However, these do little more than reiterate the definition in s 74:

Consent has a particular legal meaning. A person consents only if she (he) agrees by choice, and she (he), at the relevant time, has the freedom and capacity to make that choice. To prove that the complainant did not consent, the prosecution must make you sure on all the evidence that the complainant did not give her consent by an exercise of free choice. Submission of her free choice to a demand expressed physically or in words is not the same as consent. On the other hand, an exercise of free choice can lead to reluctant agreement and that is not the same as submission. You will need to consider the evidence with care before you decide whether the prosecution has proved that the complainant did not consent to sexual intercourse.<sup>669</sup>

This direction leaves it to the jury to decide the degree of coercion, abuse of position or authority which needs to be exercised upon a complainant's mind. Therefore, it remains a matter for the jury to decide whether an employee, who is suffering from financial hardships, and submits to sexual activity because her employer has threatened to terminate her employment did in fact freely agree.<sup>670</sup> According to Rook and Ward, the availability of an alternative course of action to a complainant may be highly relevant. Thus, a false promise<sup>671</sup> of marriage<sup>672</sup> in return for intercourse would not vitiate consent because the complainant would still be freely agreeing to sexual relations.<sup>673</sup>

According to Kantian autonomy, the availability of alternatives does not take away from the fact that an individual is relying on coercive conduct in order to procure sexual activity. A defendant who uses coercion or fraud to procure sexual activity is violating the complainant's sexual autonomy because he is using her merely as a means and not as an end. Moreover, his

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<sup>669</sup> Judicial Studies Board (2010) <[http://www.judiciary.gov.uk/NR/rdonlyres/BE25EBB6-AAD2-4ACD-8115-28D3BF613164/0/benchbook\\_criminal\\_2010.pdf](http://www.judiciary.gov.uk/NR/rdonlyres/BE25EBB6-AAD2-4ACD-8115-28D3BF613164/0/benchbook_criminal_2010.pdf)>, 359 accessed 21 June 2013.

<sup>670</sup> Under the SOA 1956, sexual intercourse procured by threats insufficient to negative consent could have been prosecuted under s 2 which dealt with 'procurement of a woman by threats'. This provision was repealed and not replaced by the SOA 2003.

<sup>671</sup> Section 3 of the SOA 1956, dealt with procuring sexual intercourse by false pretences or representations. This provision, similar to s 2, was also repealed and not replaced by the SOA 2003.

<sup>672</sup> *R v Papadimiyopolous* [1957] 98 CLT 249.

<sup>673</sup> Rook and Ward (n585), para 1.85.

coercive or fraudulent conduct would be considered impermissible because his maxim cannot be universalised without contradiction.<sup>674</sup> It has been suggested that consent can be vitiated by duress or coercion.<sup>675</sup> Therefore, unlike the Kantian notion of freedom, the complainant's inclinations will not undermine her autonomy. Despite these criticisms, free agreement by choice emphasises the focus upon the complainant's autonomy and adopts a Kantian model regarding the fact that the complainant's freedom must be unhindered by external influences.

### **Evidential presumptions as to consent**

The SOA 2003 creates rebuttable evidential presumptions (s 75) and conclusive presumptions as to the complainant's lack of consent (s 76). The use or threat of violence is covered by the evidential presumption of absence of consent in s 75.<sup>676</sup> The SOR thought that in addition to defining what consent was, it should also determine how it should be applied. It decided that the arguments for defining and explaining consent in statute were overwhelming. The SOR thought that the approach adopted in a number of Australian states and the US Model Code setting out a list of examples of circumstances where consent was not present was helpful to all concerned. The list would be a set of examples; it would not be complete, nor would it cover each and every circumstance where consent is not present.<sup>677</sup>

The SOR's suggested list was in fact significantly wider than the circumstances enacted in s 75(2), and included the case where a complainant 'submits or is unable to resist because of threats or fear of serious harm or serious detriment of any type to themselves or another person'.<sup>678</sup> The SOR stated that that this would cover situations such as losing a job, and it would be for the court to consider in each case the nature of threat and whether the complainant would think that she would suffer serious harm.<sup>679</sup> Therefore, this wording would have allowed the courts to determine whether the defendant's actions impacted on the complainant's decision-making process and whether his actions influenced her decision to

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<sup>674</sup> Coercion and fraud were discussed in Chapter One.

<sup>675</sup> Card *et al* (n30), para 3.35.

<sup>676</sup> This section applies to sections 1-4 of the SOA 2003.

<sup>677</sup> Home Office *Setting the Boundaries* (n26), para 2.10.9.

<sup>678</sup> Ibid.

<sup>679</sup> Ibid.

freely agree to sexual activity. The SOR's wording had the potential to incorporate Kant's CI in relation to the protection of sexual autonomy. A defendant who threatens an employee with dismissal unless she submits to his sexual demands is clearly using her merely as a means and not as an end; his actions affect her capacity to self-legislate. Moreover, his maxim cannot be universalised because coercion and fraud are impermissible and would give rise to a contradiction. O'Neill argues that the maxim of coercion is not capable of universalisation because it would contradict itself:

The maxim of coercing another has as its universalized counterpart the maxim that all coerce others; but if all coerce others, including those who are coercing them, then each parties both complies with others' wills (being coerced) and simultaneously does not comply with others but rather (as coercer) exacts their compliance. A maxim of coercion cannot coherently be universalized and reveals moral unworthiness.<sup>680</sup>

The SOR drew a distinction between threats and inducements, stating that promising rewards for sex did not prevent free agreement being given and was unlikely to be a coercive situation.<sup>681</sup> While such a situation may not amount to coercion under Kantian autonomy, the complainant can be said to lack autonomy because she is acting on inclinations and is using both herself and the defendant merely as a means and not as an end. She is acting heteronomously rather than autonomously.

An example of a Hypothetical Imperative (HI) would be 'whenever someone needs a promotion at work, she can offer herself in exchange for this benefit'. If she attempted to universalise this maxim and at the same time act on it, she may discover a contradiction; if every individual exchanged sexual activity in return for a promotion, such a maxim would undermine the value of competitiveness in the work place and employees would no longer feel they were being considered on their qualifications and experience. Her actions would fail the Formula of Universal Law (FUL) test because the action she is about to undertake (exchanging sexual activity in return for a benefit) places her interests and circumstances

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<sup>680</sup> O'Neill, *Construction of Reason: Explorations of Kant's Practical Philosophy* (n258), 96.

<sup>681</sup> Home Office *Setting the Boundaries* (n26), para 2.10.9. The Government took the view that SOR's list was too wide and this would result in difficulties in terms of covering such a wide range of threats, see *Hansard* (June 2, 2003), vol. 648, col 1082.

ahead of everyone else's. She is not only failing to respect her humanity but also the humanity of the defendant because she is using him only as a means and not at the same time as an end. In addition, the defendant who promises rewards for sex would be undermining the complainant's humanity and using her simply as a means and not as an end. He is acting contrary to the FH and, therefore, violating the CI. Since neither the complainant nor the defendant are acting freely, they can be said to be acting heteronomously and in accordance with the HI. It is only when an individual acts according to the CI that they can be said to be acting freely. Both individuals' actions are dictated by external influences and inclinations. However, they can escape the dictates of nature and circumstances by acting autonomously.<sup>682</sup> Kantian autonomy can be achieved by legislating law for themselves, unconditioned by their particular wants and desires.

The Government decided against a provision which contained a non-exhaustive list,<sup>683</sup> and instead opted for a list which is exhaustive, in the sense that circumstances outside those that fall within s 75(2)(a)-(f) will fail to raise the presumption. The Government's decision has been criticised on the grounds that it does not allow for further situations to be added through the common law.<sup>684</sup> A further criticism concerns the brevity of the list, which might be thought to undermine the statutory definition of consent, especially with regards to the omission of non-violent threats.<sup>685</sup> Incorporating a non-exhaustive list of circumstances would have allowed for the possibility to incorporate situations in which a complainant's autonomy, within the Kantian model, was violated, such as where economic threats are made.

### **Conclusive presumptions as to consent under the Sexual Offences Act 2003**

Unlike s 75, which a defendant may challenge if there is sufficient evidence, s 76 creates conclusive presumptions. Thus, if any one of the circumstances specified in s 76(2) exist, it is to be presumed conclusively that the complainant did not consent. The circumstances giving rise to a conclusive presumption are:

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<sup>682</sup> Sandel (n86), 124.

<sup>683</sup> As recommended by the Home Office *Setting the Boundaries* (n26), para 2.10.9.

<sup>684</sup> Temkin and Ashworth (n575), 338.

<sup>685</sup> Ibid.

[T]he defendant intentionally deceived the complainant as to the nature or purpose of the relevant act;

[T]he defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant.

Section 76, like s 75, applies only to the offences contained in ss 1-4. Both limbs of s 76(2) go further than the common law. Other forms of deception are not addressed, and this may prove problematic. The extent to which s 76(2) protects sexual autonomy within a Kantian framework will be examined below.

### Deception as to the nature or purpose of the act

#### *Nature of the act*

Section 76(2)(a) follows the common law established in the case of *R v Williams*,<sup>686</sup> the complainant in *Williams* was persuaded to consent because she thought it was a surgical operation and not sexual intercourse. The Court of Appeal held that:

Where [a complainant] is persuaded that what is being done to her is not the ordinary act of sexual intercourse but is some medical or surgical operation in order to give her relief from some disability from which she is suffering, then that is rape although the actual thing that was done was done with her consent, because she never consented to the act of sexual intercourse.<sup>687</sup>

The complainant was deceived as to the very nature of the act, believing it was surgery rather than sexual intercourse. ‘Nature’ of the act refers to the physical mechanics of what the defendant did to the complainant.<sup>688</sup> This is consistent with Kant’s notion of autonomy because her autonomy will be vitiated where the defendant’s deception as to the nature of the act deprives her of the capacity to self-legislate. Her decision to engage in sexual activity is influenced by the defendant’s deception. The defendant’s deception undermines both her

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<sup>686</sup> [1923] KB 340.

<sup>687</sup> *R v Williams* [1923] KB 340, 347.

<sup>688</sup> Ormerod *Smith and Hogan’s Criminal Law* (n604), 686.

*Wilkur*<sup>689</sup> and *Wille*.<sup>690</sup> Kantian autonomy as positive freedom relates to an individual's capacity for self-legislation.<sup>691</sup> Moreover, the defendant's actions are clearly designed to use the complainant as a mere means and this 'as Kant sees it, is to act on a maxim that the other cannot also adopt'.<sup>692</sup>

In *Williams*, the complainant had not consented to the defendant's true intention, namely to have sexual intercourse with her. However, a fraudulent misrepresentation that the defendant is free from HIV or other sexually transmitted diseases does not nullify consent, because there is no deception as to the nature of the act. Herring criticises the law of sexual offences by contending that:

For A to engage in sexual activities with B knowing that B would not be consenting if A revealed facts about himself amounts to a fundamental lack of respect for B's sexual autonomy.<sup>693</sup>

*R v B*<sup>694</sup> established that failing to disclose one's HIV positive status is irrelevant to the issue of consent under s 74. Latham LJ stated that:

[A]s a matter of law, the fact that the defendant may not have disclosed his HIV status is not a matter which could in any way be relevant to the issue of consent under Section 74 in relation to the sexual activity in this case.<sup>695</sup>

The Court of Appeal's decision is consistent with Rook and Ward's conclusion; a fraudulent misrepresentation that a defendant has been found not to be free from HIV or any other sexually transmitted diseases will not negative consent. The authors argue that in such cases there is no deception as to the nature of the act.<sup>696</sup> Rook and Ward's conclusion is not consistent with a Kantian framework in relation to the protection of sexual autonomy in cases where the issue of the defendant's HIV status is relevant to the complainant's consent.

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<sup>689</sup> Freedom from external or heteronomous factors.

<sup>690</sup> Refers to the complainant's freedom to self-legislate.

<sup>691</sup> Treiger-Bar-Am (n102), 564.

<sup>692</sup> O'Neill *Construction of Reason: Explorations of Kant's Practical Philosophy* (n240), 138.

<sup>693</sup> Herring, 'Mistaken Sex' (n11), 517.

<sup>694</sup> [2007] 1 WLR 1567 (this case is also known as *R v EB*).

<sup>695</sup> Ibid, 1572.

<sup>696</sup> Rook and Ward (n558), para 1.143.



Focusing on the nature of the act detracts from the fact that the defendant has deliberately deceived the complainant in order to procure sexual activity. This approach is not consistent with Kantian autonomy. Abolition of 'nature and purpose of the act' as a sub-category, may result in the current law of sexual offences becoming more consistent with Kantian autonomy. The focus will be on whether the defendant's actions negatively affected the complainant's decision-making process.

It is submitted that in cases where the defendant is aware that, but for his deception as to his HIV status, the complainant would not have agreed to sexual activity, the defendant is clearly using the complainant merely as a means and not at the same time as an end. However, it is not the complainant as a human being which the defendant must respect rather her humanity, which he must treat as an end in itself and these include 'capacities to engage in self-directed rational behaviour and to adopt and pursue our own ends, and any other capacities necessary connected with these'.<sup>697</sup>

In *R v Dica*,<sup>698</sup> the defendant, knowing that he was HIV positive, engaged in consensual unprotected sexual intercourse with two complainants, which resulted in them becoming infected with HIV. He was convicted of inflicting grievous bodily harm, contrary to s 20 of the Offences Against the Person Act 1861. The defendant appealed and a retrial was ordered. In relation to the issue of consent regarding sexual intercourse, the Court of Appeal held that:

The only frauds that would vitiate consent are as to the identity of the perpetrator or the nature of the act. The fact of a person's HIV or other sexually transmitted disease status cannot vitiate consent. Consent to sexual intercourse includes consent to the possible outcomes of such activity, including pregnancy and sexually transmitted diseases.<sup>699</sup>

Under a Kantian notion of autonomy, the concealment of a sexually transmitted disease may give rise to a violation of sexual autonomy because a person would be treating another simply

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<sup>697</sup> R. Johnson, 'Kant's Moral Philosophy', *The Stanford Encyclopedia of Philosophy* (2011) The Stanford Encyclopedia of Philosophy, E. N. Zalta ed <<http://plato.stanford.edu/archives/spr2011/entries/autonomy-moral/>> accessed 11 July 2013.

<sup>698</sup> [2004] QB 1257.

<sup>699</sup> Ibid, 1259.

as a means and not at the same time as an end. Consequently, a Kantian interpretation of s 76 is capable of extending the meaning of 'nature' to cover situations where a defendant conceals his status in relation to sexually transmitted diseases. An alternative method of protecting sexual autonomy in such cases, under the SOA 2003, would be for the jury to examine whether such a factor was relevant when considering the issue of consent under s 74.

In relation to whether the current law provides adequate protection in cases involving deception, Herring argues that 'agreement obtained by deception is woefully insufficient. Informed and free consent, at least, is required'.<sup>700</sup> This view seems to be consistent with the decision in *Konzani*, where the Court of Appeal recognised the principle of personal autonomy. According to Judge LCJ, concealment of HIV status by an individual:

[A]lmost inevitably means that she is deceived. Her consent is not properly informed, and she cannot give an informed consent to something of which she is ignorant. Equally, her personal autonomy is not normally protected by allowing a defendant who knows that he is suffering from the HIV virus which he deliberately conceals, to assert an honest belief in his partner's informed consent to the risk of the transmission of the HIV virus.<sup>701</sup>

Applying this reasoning to sexual autonomy, a defendant who deceives a complainant regarding his HIV status in order to procure sexual intercourse should be liable for committing a sexual offence.

The Court of Appeal in *Konzani* also stated that:

If an individual who knows that he is suffering from the HIV virus conceals this stark fact from his sexual partner, the principle of her personal autonomy is not enhanced if he is exculpated when he recklessly transmits the HIV virus to her through consensual sexual intercourse. On any view, the concealment of this fact from her almost inevitably means that she is deceived. Her consent is not properly informed, and she cannot give an informed consent to something of which she is ignorant. Equally, her personal autonomy is not normally protected by allowing a

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<sup>700</sup> J. Herring, 'Human rights and rape: a reply to Hyman Gross', [2007] Crim LR 228, 229.

<sup>701</sup> *R v Konzani* [2005] EWCA Crim 706, para 42.

defendant who knows that he is suffering from the HIV virus which he deliberately conceals, to assert an honest belief in his partner's informed consent to the risk of the transmission of the HIV virus. Silence in these circumstances is incongruous with honesty, or with a genuine belief that there is an informed consent.<sup>702</sup>

The above judgment suggests that the current law of sexual offences is capable of protecting sexual autonomy within a Kantian framework.

Leigh argues that:

It is difficult to see how a person can be said to agree by choice when a matter relevant to choice (as will certainly be the case where the victim has raised the issue of HIV status with the actor) is misrepresented to her.<sup>703</sup>

Leigh's argument is further authority that deception by a defendant in relation to his HIV status negatives consent. Unfortunately, the courts have been reluctant to extend the remit of s 74 to cover cases where the defendant obtains consent by deception.

In *R v B*, the Court of Appeal held that:

Where one party to sexual activity has a sexually transmissible disease which is not disclosed to the other party any consent that may have been given to that activity by the other party is not thereby vitiated. The act remains a consensual act.<sup>704</sup>

The Court further stated that evidence of the defendant's sexual diseases was inadmissible when considering s 74. This decision fails to protect sexual autonomy within a Kantian framework, similar to *Dica*. *R v B* is clearly not consistent with Kantian autonomy because it fails to recognise that the defendant's deception falls outside the scope of the CI. A different view was suggested in the minority judgment of McLachlin J (Gonthier J concurring) in the Canadian case of *R v Cuerrier*.<sup>705</sup> Although McLachlin J's judgment is in relation to the offence of sexual assault, it can be applied to the protection of sexual autonomy in cases

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<sup>702</sup> Ibid, para 42.

<sup>703</sup> L. H. Leigh, 'Two cases on consent in rape' [2007] Arch News 6, 7.

<sup>704</sup> *R v B* [2006] 1 WLR 1567, 1571.

<sup>705</sup> [1998] SCR 371.

involving sexually transmitted diseases. McLachlin J advocates a return to pre-*Clarence*<sup>706</sup> decisions which recognised that a deception involving a sexually transmitted disease vitiated consent in relation to the assault group of offences.<sup>707</sup> According to Leigh, deception as to the HIV status of the defendant ‘goes to the nature of the sexual act, changing it from an act that has certain natural consequences (whether pleasure, pain or pregnancy), to a potential sentence of disease or death’.<sup>708</sup>

Leigh contends that it is possible for an English court to adopt similar reasoning and to conclude that a person cannot agree by choice to sexual intercourse where she has been misled or is unaware of the fact that her partner suffers from a sexually transmitted disease. His reasoning is not based on the fact that such sexual activity amounts to an assault, but rather on the consideration that the deception goes to the very nature of the sexual activity.<sup>709</sup> Leigh’s recommendation follows the reasoning provided by McLachlin J in *Currier*. This approach would allow the current law to protect sexual autonomy more effectively. This recommendation is also consistent with Kantian autonomy because it protects individuals from deception.

Herring contends that the SOA 2003 abolished s3 of the SOA 1956 without replacing it.<sup>710</sup> The Criminal Law Revision Committee (CLRC) recommended that sections 2 and 3 of the SOA 1956 should continue in their present terms.<sup>711</sup> This recommendation may have ensured that acts which do not fall under the definition of rape could fall under one of the lesser offences. Implementing the CLRC’s recommendations would have incorporated a Kantian model within the SOA 2003 in relation to the protection of sexual autonomy in cases involving deception.

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<sup>706</sup> Overruled by *R v Dica*.

<sup>707</sup> *R v Currier* [1998] SCR 371, para 72.

<sup>708</sup> *Ibid*, para 73.

<sup>709</sup> Leigh (n703), 9.

<sup>710</sup> Herring, ‘Mistaken Sex’ (n11), 522.

<sup>711</sup> Criminal Law Revision Committee, *Fifteenth Report: Sexual Offences* (Cmnd 9213, 1984), paras 2.107 – 2.112. See also B. Hogan, ‘On Modernising the Law of Sexual Offences’, in P. R. Glazebrook (ed), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (Stevens & Sons 1978), 174 and J. Temkin, ‘Towards a Modern Law of Rape’ [1982] MLR 399.

In the recent case of *Assange v Swedish Prosecution Authority*,<sup>712</sup> which concerned the extradition of Julian Assange to Sweden. It was alleged that he consummated unprotected sexual intercourse without the complainant's knowledge, when it was her express wish that a condom be used. It was held that this amounted to rape under s 74 because his deception had undermined the complainant's agreement.<sup>713</sup> The court stated that his deception was not contrary to s 76 because it was not a deception as to the nature or quality of the act.<sup>714</sup> This decision protects sexual autonomy only under s 74. A Kantian interpretation, on the other hand, would protect sexual autonomy under both sections 74 and 76 because it examines whether the defendant had used the complainant simply as a means and not at the same time as an end.

#### *Purpose of the act*

The presumption would apply in cases such as *R v Green*,<sup>715</sup> where a doctor had carried out bogus medical examinations. The men understood the nature of the acts they were performing but they were deceived as to the purpose of doing so. The complainants were deceived into believing that the act of masturbation was for medical reasons. The Court of Appeal held that there was clearly a deception as to the 'purpose' of the physical act. This decision is consistent with Kantian autonomy. The case of *R v Piper*,<sup>716</sup> provides another illustration in which the Court's decision appears to be consistent with Kantian autonomy. In *Piper*, the Court held that the defendant's touching amounted to a sexual assault given that he had invited the complainant on the basis that he was running a modelling agency. The true purpose of the touching was for sexual gratification.

Since s 76 appears to be consistent with Kantian autonomy, the next issue which requires addressing is whether this provision is capable of protecting sexual autonomy within a Kantian framework in cases such as *R v Linekar*.<sup>717</sup> In *R v Linekar*, which was discussed in

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<sup>712</sup> [2011] EWHC 2849 (Admin). See also J. Rogers, 'The effect of "deception" in the Sexual Offences Act 2003' [2013] Arch Rev 7.

<sup>713</sup> [2011] EWHC 2849 (Admin), para 89.

<sup>714</sup> Ibid, para 87.

<sup>715</sup> [2002] EWCA Crim 1501.

<sup>716</sup> [2007] EWCA Crim 2151.

<sup>717</sup> [1995] 2 QB 250.

chapter three, the defendant deceived the complainant into believing that he would pay a prostitute for her services when in fact he had no intention of paying the complainant. The Court of Appeal quashed his conviction on the grounds that his deception was not in relation to the nature of the act but only to the payment. It is argued that s 76(2)(a) is capable of protecting sexual autonomy within a Kantian framework because failure to pay alters the ‘purpose’ of the act. The defendant’s actions in *Linekar* amounted to a violation of the complainant’s sexual autonomy. The defendant’s deception resulted in a breach of the FUL because he has treated the complainant merely as a means. The complainant who is deceived cannot possibly agree with the defendant’s way of behaving towards her, and so cannot herself share the end of the action.<sup>718</sup> The complainant in *Linekar* was used merely as a means to satisfy the defendant’s sexual pleasure. Mappes suggests that the morally significant sense of using another person is best understood by reference to the notion of ‘voluntarily informed consent’.<sup>719</sup> He states that:

A immorally uses B if and only if A intentionally acts in a way that violates the requirement that B’s involvement with A’s ends be based on B’s voluntary informed consent.<sup>720</sup>

The deception of the defendant in *Linekar* not only violates the complainant’s sexual autonomy but also undermines the informed character of voluntary consent. Similarly, a deception on the defendant’s part that he and the complainant are married<sup>721</sup> will not vitiate consent under the SOA 2003. While it cannot be said that such a deception involves the nature or purpose of the act, it does, however, fail to protect sexual autonomy within a Kantian model. The Formula of the Law of Nature (FLN) instructs individuals to ‘act as if the maxim of your action were to become through your will a universal law of nature’.<sup>722</sup> In order to determine whether a defendant’s proposed maxim, in the above scenario, could be willed to be a universal law of nature two questions must be answered. The first concerns whether it would be logically possible for a defendant to will the universalisation of his

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<sup>718</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 92.

<sup>719</sup> T. A. Mappes, ‘Sexual Morality and the Concept of Using Another Person’, in A. Soble (ed), *The Philosophy of Sex* (4<sup>th</sup> edn, Roman & Littlefield 2002), 208.

<sup>720</sup> Ibid.

<sup>721</sup> *Papadimitropoulos* (1957) 98 CLR 249.

<sup>722</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 84.

maxim if every individual was also to do so. Secondly, even if it would be logically possible for the defendant to will the universalisation of his maxim, whether that is something he could rationally will without contradiction.<sup>723</sup> Therefore, if every individual were to resort to deception to procure sexual intercourse, the very practice of telling the truth would collapse because individuals would disbelieve truthful statements.

While the SOA 2003 appears to be consistent with Kantian autonomy, the courts have shown a reluctance to over extend the scope of s 76. In *R v Jheeta*,<sup>724</sup> the complainant had been deceived as to the nature or purpose of the act. The defendant deceived her into having intercourse with him to avoid being fined by the police and also to avoid his committing suicide. The Court of Appeal held s 76 had no application as to the nature or purpose of the act. According to the Court of Appeal:

[T]he ambit of section 76 is limited to the “act” to which it is said to apply. In rape cases the “act” is vaginal, anal or oral intercourse. Provided this consideration is constantly borne in mind, it will be seen that section 76(2)(a) is relevant only to the comparatively rare cases where the defendant deliberately deceives the complainant about the nature or purpose of one or other form of intercourse. No conclusive presumptions arise merely because the complainant was deceived in some way or other by disingenuous blandishments of or common or garden lies by the defendant. These may well be deceptive and persuasive, but they will rarely go to the nature or purpose of intercourse. Beyond this limited type of case, and assuming that, as here, section 75 has no application, the issue of consent must be addressed in the context of section 74.<sup>725</sup>

Kantian autonomy regards all deceptions as being inconsistent with the CI. Therefore, the Court’s application of s 76 is not consistent with Kantian autonomy. The defendant was, however, convicted of rape because, by his own admission, on some occasions that intercourse had taken place the complainant was not truly consenting.

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<sup>723</sup> Ibid, 87.

<sup>724</sup> [2007] EWCA Crim 1699.

<sup>725</sup> Ibid, para 24.

The advantage of following a Kantian framework is that inconsistencies may be avoided. In *R v Devonald*,<sup>726</sup> the defendant sought to humiliate his daughter's ex-boyfriend. Using a fake email account, the defendant pretended to be a young woman and persuaded the complainant to masturbate in front of a webcam. The trial judge ruled that s 76(2) (a) applied. The Court of Appeal dismissed an application for leave to appeal, holding that it was open for the jury to conclude that the complainant had been deceived as to the purpose of the act. The Court stated that:

[I]t is difficult to see how the jury could have concluded otherwise that the complainant was deceived into believing that he was indulging in sexual acts with, and for the sexual gratification of, a 20-year-old girl with whom he was having an on line relationship.<sup>727</sup>

The defendant's purpose in causing the complainant to engage in sexual activity was not to secure sexual gratification. His purpose was to cause the complainant to engage in a sexual act for the purpose of embarrassing him. Although this decision is out of step with *Jheeta*, it is consistent with Kantian autonomy. The defendant in *Devonald* was clearly using the complainant only as a means and not at the same time as an end.<sup>728</sup>

### **Impersonating a person known personally to the complainant**

Section 76(2)(b) relates to inducement of the complainant to consent to sexual activity by impersonating 'a person known personally to the complainant'. It has been suggested that this provision embraces a wide spectrum of defendants, from those the complainant has never met but has heard of to those whom the complainant has met.<sup>729</sup> However, for s 76(2)(b) to apply:

[I]t is not necessary for the person impersonated to be someone who has previously engaged in sexual activity with the complainant. For example, a man could

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<sup>726</sup> [2007] EWCA Crim 527.

<sup>727</sup> *R v Devonald* [2007] EWCA Crim 527, para 6.

<sup>728</sup> See also *R v Tabassum* [2002] 2 Cr App R 328.

<sup>729</sup> Rook and Ward (n585), para 1.151.



impersonate his twin brother in order to engage in sexual activity with a woman whom he knows would be willing to engage in sexual activity with his brother.<sup>730</sup>

Rook and Ward argue that as a bare minimum, the person impersonated should be someone the complainant has met.<sup>731</sup> This provision is too narrow, within a Kantian framework, because it prevents the presumption arising when a defendant claims to be a celebrity whom the complainant has not met. In such scenarios s 76(2)(b) is not consistent with Kantian autonomy.

The SOA 2003 also fails to protect the sexual autonomy of complainants who are deceived into agreeing to sexual activity as a result of fraud as to the defendant's attributes or qualifications. By way of example, the defendant in *R v Richardson*<sup>732</sup> had continued to practice as a dentist despite being suspended. Patients claimed that they would not have allowed her to treat them if they had known of her suspension. The prosecution argued that the complainants had been deceived into consenting to treatment by the defendant's representation that she was a qualified and practicing dentist. The prosecution contended that the concept of identity should be extended to include the qualifications or attributes of the dentist, on the basis that the complainants had only consented to treatment by a qualified practitioner who was not suspended. The defendant pleaded guilty to assault after the trial judge ruled that her deception had vitiated the complainants' consent. The judge rejected the defence submission that the complainants had consented to treatment despite their ignorance of her suspension. The Court of Appeal quashed the defendant's conviction. The court did not accept the prosecution's argument that the concept of identity of a person extended to cover the qualifications or attributes of the dentist on the grounds that:

In all charges brought against the [defendant] the complainants were fully aware of the identity of the appellant. To accede to the submission would be to strain or distort the every day [sic] meaning of the word identity, the dictionary definition of which is "the condition of being the same".<sup>733</sup>

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<sup>730</sup> Home Office (Circular 21/12004), *Guidance as to Part 1 of the Sexual Offences Act 2003*, para 337.

<sup>731</sup> Rook and Ward (n585), para 1.151.

<sup>732</sup> *R v Richardson* [1998] 2 CR App R 200.

<sup>733</sup> *Ibid*, 206.

The court quoted Professor John Smith, who stated that '[f]raud does not necessarily negative consent. It does so only if it deceives P as to the identity of the person or the nature of the act'.<sup>734</sup> It can therefore be surmised that s 76(2)(b) does not fully protect sexual autonomy within a Kantian model. If an impersonator lies or withholds information from the complainant, his actions amount to deception. In such cases, the complainant's consent is obtained by the defendant's deception because she is prevented from legislating laws for herself which are free from external influences. The defendant's actions are not in accordance with the CI because he has acted on his inclinations, and his actions undermine the complainant's sexual autonomy because his maxim cannot be willed as a universal law without giving rise to a contradiction. Moreover, the FH prohibits individuals from using rational beings simply as a means. The defendant's actions undermine the rational will of the complainant. The complainant's capacity to choose whether to engage in sexual intercourse is undermined by the defendant's deception. Her autonomy is violated because she no longer becomes the legislator of laws valid for all rational beings, because her decision was influenced by the defendant's deception. Her decision to agree to sexual activity lacks both independence in decision-making and the capacity to self-legislate.

### **Limitations of the Sexual Offences Act 2003**

In *R v Tabassum*,<sup>735</sup> the defendant, who was not medically qualified, persuaded several complainants to measure their breasts by representing that he was conducting a survey for medical purposes. His convictions for indecent assault were upheld, notwithstanding that the complainants were fully aware of the nature of the acts. Following *Tabassum*, a person's sexual autonomy is protected in cases where she was mistaken as to the quality of the act, despite the fact that she was aware of the nature of the act.<sup>736</sup> The concept of 'quality' has not been incorporated into the SOA 2003. However, the inclusion of 'purpose' in s 76(2)(a) may allow for an extension of the law. Moreover, evidence of a defendant's deception as to

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<sup>734</sup> J. C. Smith, *Smith & Hogan Criminal Law* (8<sup>th</sup> edn, Butterworths Law 1996), 420.

<sup>735</sup> [2002] 2 Cr App R 328.

<sup>736</sup> Home Office *Setting the Boundaries* (n26), para 2.10.9.

the quality of the act should be made available to the jury when considering whether consent was present under s 74.<sup>737</sup>

The current law of sexual offences does not contain provisions for the protection of sexual autonomy in relation to mistakes induced by the defendant such as mistakes concerning his marital status or wealth. Thus, peripheral issues which do not relate to the nature or purpose of the act will not vitiate consent under the present law. The law is also silent in relation to abuse of power, authority or position of trust. An employee might submit to sexual activities because she fears that she will be dismissed if she does not comply. Kantian autonomy would afford protection in such circumstances because it focuses on whether the defendant has respected the complainant's humanity and whether he has treated her simply as a means. As stated in chapter one deceptions and coercive conduct violate Kantian autonomy because the defendant's actions are not in accordance with the CI.

Temkin and Ashworth state that s 74 of the SOA 'positively sprouts uncertainties',<sup>738</sup> while Card *et al* acknowledge that the terms 'freedom', 'choice' and 'agreement' are 'complex and ambiguous concepts, which defy precise definition'.<sup>739</sup> Consequently, the previous problems of interpretation and clarity do not seem to have been resolved by s 74. The issue of clarity is linked to whether s 74 adequately protects sexual autonomy. Although s 74 is consistent with Kantian autonomy and, as an essential element of sexual offences, is now defined by statute, it suffers from the same criticisms as the *Oluboja* direction in relation to clarity and certainty.

Kantian autonomy can be used to protect sexual autonomy in circumstances where a person procures sexual activities by using non-violent pressures, such as threatening an employee with dismissal if she does not submit to his sexual demands. The SOR recommended that a person should be deemed not to consent:

Where a person submits or is unable to resist because of threats of fear of serious harm or serious detriment of any type to themselves or another person.<sup>740</sup>

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<sup>737</sup> D. Ormerod, *Smith and Hogan's Criminal Law* (13<sup>th</sup> edn, OUP 2011), 733.

<sup>738</sup> Temkin and Ashworth (n575), 339.

<sup>739</sup> *Ibid*, 336.

<sup>740</sup> Home Office *Setting the Boundaries* (n26), para 2.10.9.

This would have covered situations where other threats were made such as losing a job. This recommendation, however, was not incorporated into the SOA 2003. Sexual autonomy would have been protected within a Kantian framework if the above recommendation had been incorporated into the SOA 2003. Alternatively, a replacement of s 2 of the SOA 1956<sup>741</sup> would have achieved the same result. However, s 74 of the SOA 2003, is capable of protecting sexual autonomy within a Kantian framework, where the non-violent threat is aimed at using another simply as a means and the person making such threats is acting only on his inclinations. This Kantian approach might protect sexual autonomy in cases where, by way of example, a coercive offer is made where an employee is denied a rise unless she submits to sexual activities with the employer, regardless of whether she had earned a rise or not.

Similarly, by adopting a Kantian approach, the SOA 2003 would be capable of protecting sexual autonomy in situations involving deceptions in peripheral circumstances that do not relate to the nature or purpose of the act. An alternative solution to over-extending the scope of s 76 would be to re-enact s 3 of the SOA 1956 and criminalise procuring sexual activity by false pretences.

A further limitation of the SOA 2003 concerns its failure to protect sexual autonomy where a complainant provides apparent consent to sexual activity due to a mistake. Herring puts forward the argument that any such mistake can vitiate consent. Herring formulates a legal rule in the following form:

If at the time of the sexual activity a person:

is mistaken as to a fact; and

had s/he known the truth about that fact would not have consented to it

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<sup>741</sup> Section 2(1) states that 'It is an offence for a person to procure a woman, by threats or intimidation, to have unlawful sexual intercourse in any part of the world'.

Included in the word ‘fact’, in this test, would be the state of mind of the defendant. The mistake need not be to an issue which would be regarded as material to the reasonable person, if it was a pre-requisite to consent for the particular victim.<sup>742</sup>

He also argues that it is immaterial whether the defendant had caused the complainant’s mistake.<sup>743</sup> Herring’s reasoning is consistent with Kantian autonomy. A person is using another simply as a means if he engages in sexual activities knowing that his sexual partner would not be consenting if he revealed facts about himself. Such use of another person amounts to ‘a fundamental lack of respect for B’s sexual autonomy’.<sup>744</sup>

The main issue facing the application of Kantian autonomy in a practical context is the fact that Kant does not distinguish between genuine needs and mere wants. This lack of distinction results in individuals who act on needs or wants, obeying the HI rather than the CI. This obstacle can be overcome by focusing on the fact that Kantian autonomy allows for inclinations to be part of a decision-maker’s process, provided he also adheres to the CI. According to Allison:

[A]lthough self-interest cannot ground a categorical imperative, self-interested action is morally permissible, subject to the limiting condition that it does not conflict with universal interests.<sup>745</sup>

Kantian autonomy is not violated if an agent has an inclination to perform an otherwise morally praiseworthy act. Kant states that an act will lack moral worth if the individual performing it only does so because of an inclination.<sup>746</sup>

‘Choice’, ‘freedom’ and ‘capacity’ are concepts to be found in Kantian autonomy. Kantian Autonomy is the capacity to act on rational principles and to exercise moral reasoning through freedom of choice.<sup>747</sup> Beyond freedom from physical pressure, the current law of sexual offences does not make clear the degree of freedom required to validate consent.

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<sup>742</sup> Herring, ‘Mistaken Sex’ (n11), 517.

<sup>743</sup> Ibid.

<sup>744</sup> Ibid.

<sup>745</sup> Allison (n215), 105.

<sup>746</sup> Kant, *Critique of Practical Reason* (n285), 122.

<sup>747</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 101.

Kantian autonomy requires that individuals act according to the moral law in order to attain freedom from inclinations. By acting contrary to the moral law, a person can be said to be acting according to a HI. A person's heteronomous actions in relation to using another for sexual gratification may amount to a violation of sexual autonomy within a Kantian framework because he is using another simply as a means and not at the same time as an end.

## **Conclusion**

The central aim of this chapter is to determine whether the current law of sexual offences is consistent with Kantian autonomy. Starting with the concept of consent, as defined by s 74 of the SOA 2003, it is concluded that this definition is consistent with Kantian autonomy because it focuses on the individual's freedom to choose whether or not to engage in sexual activity. This is in line with a Kantian framework that is based on the capacity to act on rational principles as well as being able to freely 'exercise the moral reasoning will, through the freedom of choice'.<sup>748</sup> The complex philosophical concepts used to define consent, such as 'freedom' and 'choice', have been left to the courts to interpret. Key terms such as 'freedom' and 'choice' being left to the courts does not take away from the fact that a statutory definition of consent is more effective at protecting sexual autonomy than the previous definition provided in *Olugboja* because it provides an opportunity for the courts to interpret s 74 in cases not covered under ss 75 and 76.

It has been shown that adopting a Kantian model in relation to the interpretation of the provisions relating to consent with the SOA will allow for the current law to become consistent with Kantian autonomy. Adopting a Kantian interpretation would protect sexual autonomy in cases where a defendant has withheld information regarding the fact that he suffers from a sexually transmitted disease or deceiving the complainant in relation to his marital status.

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<sup>748</sup> Treiger-Bar-Am (n102), 555.

## Chapter Five: Practical Limitations to Kantian autonomy

### Introduction

This chapter will examine the barriers to Kantian autonomy in relation to protecting a person's sexual autonomy in a practical context. This analysis will demonstrate that Kantian autonomy is capable of being applied in a practical context in relation to the protection of sexual autonomy. Since autonomy of the will is the property that the will has of being a law to itself, the will is a kind of causality belonging to individuals in so far as they are rational. While freedom is the property of such causality that it be independent of foreign causes determining it. Kant holds that autonomy is 'the basis of the dignity of human and of every rational nature'.<sup>749</sup>

Kantian autonomy refers to self-determination rather than freedom from the governance of others. Kant's theory of autonomy suggests that inclinations can form part of an individual's decision-making process in relation to sexual activity with others provided such inclinations were not the only factors affecting her decision. If her decision was purely based on inclinations, then she can be said to be acting heteronomously rather than as a sexually autonomous person. Young states that 'individual autonomy...has been construed by philosophers as a *character ideal* or *virtue*. Such a construction is clearly associated with the Kantian tradition'.<sup>750</sup> Kantian autonomy links reason with autonomy as the most valuable means by which an individual can control her actions.<sup>751</sup> Thus, an autonomous individual is one who is able to make choices based on critical reflection, as opposed to being merely a chooser. It has been stated that to be autonomous within a Kantian model is emphatically not to be able to do whatever an individual desires, but to have the capacity for rational self-governance.<sup>752</sup> However, this does not mean that such an individual should be continuously engaged in a process of criticism and self-evaluation. Therefore, it does not appear that the individual's choice be rational, only that the person in question be prepared to revise false

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<sup>749</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 97.

<sup>750</sup> Young (n158), 9.

<sup>751</sup> Ibid, 10.

<sup>752</sup> Page 64.

beliefs or poor choices when further evidence arises which implies that such beliefs are false or the choices poor'.<sup>753</sup> Benn continues by stating that:

[T]he principles by which the autonomous man governs his life make his decisions consistent and intelligible to him as his own; for they constitute the personality he recognizes as the one he has made his own. His actions, in instantiating his principles, thus express his own moral nature.<sup>754</sup>

A heteronomous person, on the other hand, is one whose *nomoi*<sup>755</sup> that govern him affect his decision as alien restraining causes.<sup>756</sup> According to Feinberg, constraints can be external positive constraints, external negative constraints, internal positive constraints and internal negative ones.<sup>757</sup> External positive constraints encompass physical barriers and coercive threats. External negative constraints on the other hand consist of inadequate resources. Headaches, obsessive habits and neuroses are classed as internal positive constraints, whilst lack of skill or ability and similar failings fall under the category of internal negative constraints.<sup>758</sup> Feinberg's classification of the various constraints will be used because it provides a useful framework for determining to what extent Kantian autonomy can be applied in a practical context. His classification also provides a useful framework for considering the various methods in which barriers to an individual's sexual autonomy may arise. An understanding of these constraints will assist in determining the elements which undermine sexual autonomy within a Kantian framework in a practical context.

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<sup>753</sup> Young (n158), 11.

<sup>754</sup> Benn (n161), 29.

<sup>755</sup> Law.

<sup>756</sup> Kant, *The Metaphysics of Morals* (n255), 75.

<sup>757</sup> J. Feinberg, *Social Philosophy* (Prentice Hall 1973), 13.

<sup>758</sup> Young (n158), 35.



## External obstacles

An unambiguous example of an external obstacle is the threat of immediate violence. Thus, the coercive behaviour of a pimp or a violent spouse can undermine a person's capacity to decide on whether to agree to sexual activity. A pimp or a violent spouse who uses violent coercion to obtain sexual intercourse is clearly not furthering the ends of other rational agents. This will result in a violation of the complainant's sexual autonomy. However, matters can get complicated where the complainant decides to forsake her aspirations. In such cases it may be assumed that the person has been manipulated into a servile role.<sup>759</sup>

Procuring sexual intercourse by coercion or fraud fails to respect the dignity of the complainant because it would fail as a universal law of nature.<sup>760</sup> It cannot be willed that every individual can employ coercive methods in order to procure sexual intercourse. It would not be possible to will such a law unless every defendant was also willing to be coerced. The acts of coercion and manipulation require using an individual as a means to satisfy the defendant's sexual inclinations. The defendant in such situations does not treat the complainant as an end and he fails to respect her humanity as an end in itself. It is argued that in order to demonstrate the application of Kantian autonomy to practical situations involving coercion, it is important to distinguish between coercive conduct and circumstances where the complainant is under the powerful influence of another.

According to Schulhofer, 'threats represent a clear cut interference with autonomy. They are inherently coercive and illegitimate. Offers may have severe coercive effects, or they may be considered illegitimate for other reasons'.<sup>761</sup> Similarly, Wertheimer states that:

Perhaps the key to coercion is not in the choice situation itself, but in its genesis, the sorts of proposals that create B's choice conditions. The dominant philosophical view about coercion is to be found along those lines. That view maintains that threats coerce whereas offers do not.<sup>762</sup>

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<sup>759</sup> Ibid, 35

<sup>760</sup> Page 47.

<sup>761</sup> Schulhofer (n13), 118.

<sup>762</sup> A. Wertheimer, *Coercion* (CUP 1989), 202.

However, it remains the case that the distinction between submission and legitimate acquiescence amounting to consent in English law is unclear.<sup>763</sup> Prior to the Sexual Offences Act (SOA 2003), the clearest statement of the law in this area was found in the judgment provided by the Court of Appeal in *R v Olugboja*,<sup>764</sup> which held that the jury should be directed that consent is to be given its ordinary meaning, and that there is a difference between consent and submission.<sup>765</sup>

The Court went on to state that ‘the dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw’. The jury should also ‘be directed to concentrate on the state of mind of the victim immediately before the act of sexual intercourse’.<sup>766</sup> As discussed in chapter four, the SOA 2003 defines consent as agreeing by choice and having the freedom and capacity to make that choice.<sup>767</sup> The SOA 2003 also provides that there will be a presumption that consent was absent where violence is used or threatened towards the victim or another person.<sup>768</sup> Although under the SOA 2003 many non-immediate threats would vitiate consent,<sup>769</sup> there appears to be little scope for the law in England to protect the sexual autonomy of complainants from coercive behaviour which falls below the high threshold under the SOA 2003. Given that sexual autonomy ‘embraces the mental, intellectual and physical aspects of being’,<sup>770</sup> it is disappointing that the existing law dealing with sexual offences allows for a defendant to employ coercive pressure to compel a complainant to engage in sexual activity. The current law does little to protect sexual autonomy within a Kantian framework in cases involving sexual abuse by a defendant in a position of power.<sup>771</sup> In cases involving an adult complainant with mental capacity her sexual autonomy may only be protected under s 74 of the SOA 2003. However, as stated in chapter four, s 74 does not adequately protect sexual autonomy within a Kantian framework.

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<sup>763</sup> S. Knight, ‘Libertarian critiques of consent in sexual offences’ [2012] UCL JL and J 137, 142.

<sup>764</sup> *Olugboja* [1982] QB 320.

<sup>765</sup> *Ibid*, 332.

<sup>766</sup> *Ibid*.

<sup>767</sup> SOA 2003, s74.

<sup>768</sup> *Ibid*, s 75.

<sup>769</sup> R. Card, *Sexual Offences: The New Law* (Jordon 2004), n10.

<sup>770</sup> K. Tong, ‘Date rape: real rape’ [2002] UCL Juris Rev 130, 130.

<sup>771</sup> Laws exist to protect complainants who are deemed mentally incapable of consenting as well as prohibiting those in a position of trust over under-18s from valid consent (ss 16-19 and ss 30-42 of the SOA 2003).

In order to determine whether A's conduct vitiates B's consent under s 74 it is helpful to examine the distinction between threats and offers. Wertheimer writes:

The crux of the distinction between threats and offers is quite simple: A threatens B by proposing to make B worse off relative to some baseline; A makes an offer to B by proposing to make B better off relative to some baseline. More precisely, A makes a threat when, if B does not accept A's proposal, B will be worse off than in the relevant baseline position. A makes an offer when, if B does not accept A's proposal, he will be no worse off than in the relevant baseline position.<sup>772</sup>

Therefore, offers enhance the freedom of the complainant by increasing the choices available to her, whereas coercive proposals limit her choices. The question of where to draw the line regarding the permissibility of threats has also been discussed in detail by Schulhofer who reaches a similar conclusion to Wertheimer. Both agree that conduct which forces the complainant to choose between her autonomy and a legally protected right should be considered to vitiate consent.<sup>773</sup> According to Schulhofer:

When one person holds power over another, the offer to provide a benefit may mask an intent to inflict harm if the offer is refused. When this concern is present, the illegitimate offer closely approximates a threat in the classic sense.<sup>774</sup>

The current law of sexual offences should criminalise offers which conceal an intention to treat the complainant simply as a means. In such cases the Kantian model is a better tool for the protection of sexual autonomy than the existing law, because it focuses on whether the complainant's offer is aimed at treating the complainant's humanity simply as a means. If she is treated simply as a means and not as an end and his actions are based on satisfying his sexual urges, then it cannot be said that her humanity is being respected. The defendant would be acting contrary to the Formula of Humanity (FH) because he is not promoting her end; instead he is violating her sexual autonomy by undermining her capacity to decide on whether to agree to sexual activity.

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<sup>772</sup> Wertheimer (n762), 204.

<sup>773</sup> Schulhofer (n13), 132.

<sup>774</sup> Ibid, 141.

Examples such as the ‘aspiring actress’,<sup>775</sup> which involve non-corrupt offers because they are not intended to inflict harm, can be classed as ‘a trade of sexual services for benefits’.<sup>776</sup> This can be distinguished from cases involving ‘dispositional coercion’.<sup>777</sup> In dispositional coercion the emphasis is not on physical force but on the threat of harm. Harm in this context is not limited to physical harm, it can extend to coercion involving threatening to damage the complainant’s reputation unless she engages in sexual activity.<sup>778</sup>

In order to analyse the barriers to Kantian autonomy, an example provided by Wertheimer will be examined in the context of Kantian autonomy:

A, a professor, says “Have sexual relations with me and I will give you a grade two grades higher than you deserve. Otherwise you’ll get just what you deserve”.<sup>779</sup>

In the above example, A is using B simply as a means and not as an end and therefore he can be said to be violating her sexual autonomy within a Kantian framework. However, in a practical context he is not attempting to coerce consent. Instead, he is making an offer by attempting to gain compliance to sexual activity. Such a defendant is said to be inducing consent rather than coercing.<sup>780</sup> While it may appear that in such cases sexual autonomy within a Kantian framework is violated, cases involving the exchange of sexual activity in exchange for a benefit can adhere to Kantian autonomy provided the complainant’s humanity is respected. However, the above scenario might conceal an attempt by A to sexually use B on the grounds that B might feel threatened by A’s offer. In the Higher Grade scenario there is a risk that if she spurns him he will lower her grade or make it harder for her to succeed academically.

It is argued that such a person is not above abusing his institutional authority to achieve his ends on the grounds that he is willing to assign a grade higher than the student deserves.<sup>781</sup> In such a case, the person in a position of authority has violated the student’s sexual autonomy

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<sup>775</sup> Ibid, 136.

<sup>776</sup> Knight (n700), 147.

<sup>777</sup> Mappes (n719), 212.

<sup>778</sup> Ibid, 213.

<sup>779</sup> Wertheimer (n762), 178.

<sup>780</sup> Mappes (n656), 214.

<sup>781</sup> Ibid, 217.

within a Kantian framework. This is because he is using her only as a means to satisfy his sexual desires. Two further hypothetical scenarios will be examined in order to critically examine the barriers to Kantian autonomy in a practical context:

The Aspiring Model: C is a highly successful and wealthy model but has ambitions of becoming a famous actress. A is a film producer who is taken with B's beauty. He invited her for a screen test and informs her that he is prepared to make her a star on the condition that she agrees to sexual involvement with him. B finds A unattractive and with great reluctance she agrees to his proposal.

The Aspiring Actress:<sup>782</sup> D is a poverty stricken actress whose only ambition is to become a famous actress. A is a film producer who is taken with D's beauty. He invited her for a screen test and informs her that he is prepared to make her a star on the condition that she agrees to sexual involvement with him. B finds A unattractive and with great reluctance she agrees to his proposal.

In relation to C, the producer has made her an offer which she has accepted albeit reluctantly. However, there is an argument that his offer, which confronts D with an overwhelming inducement, is in fact a 'coercive offer'.<sup>783</sup> Held is a proponent of this view. In considering the distinction between rape and seduction she argues that:

In one case constraint and threat are operative, in the other inducement and offer. If the degree of inducement is set high enough in the case of seduction, there may be little difference in the extent of coercion involved. In both cases, persons may act against their own will.<sup>784</sup>

Held's analysis is consistent with Kantian autonomy in relation to seduction on the grounds that the complainant is acting heteronomously with regards to the inducement. Kantian autonomy does not make a distinction between *genuine needs* and *mere wants*.<sup>785</sup> In a practical context there is a difference between an actress who genuinely needs to become a

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<sup>782</sup> n712.

<sup>783</sup> Ibid, 219.

<sup>784</sup> V. Held, 'Coercion and Coercive Offers' in R. Pennock and J. W. Chapman (eds), *Coercion: Nomos XIV* (Granite Impex 1991), 58.

<sup>785</sup> Mappes (n719), 220.

successful actress in order to feed her children and pay her rent and a wealthy model who merely wants to become a successful actress. The producer who makes an offer to an actress facing financial difficulties is clearly attempting to sexually use her. He is violating her autonomy within a Kantian framework. Both the model and the actress reluctantly consented to sexual activity. However, the model had a choice which was not available to the aspiring actress.<sup>786</sup> From a Kantian viewpoint both the model and the actress are acting heteronomously. As stated in chapter two, Kantian autonomy involves independence in decision-making, which requires independence from heteronomous factors.<sup>787</sup> Kant's Categorical Imperative (CI) assumes individuals to be self-directing in the sense that they possess the capacity to step back from their natural desires, reflect on them, consider whether and how they should satisfy them and be moved by them only on the basis of such reflection.<sup>788</sup> According to Kant, 'for the natural use that one sex makes of the other's sexual organs is *enjoyment*, for which one gives oneself up to the other'.<sup>789</sup> The women in the scenarios relating to the aspiring model and actress are not autonomous in the moral sense because not guided only by their own conception of happiness rather than by a universalized concern for the ends of all rational individuals.<sup>790</sup>

The difficulty in protecting Kantian autonomy in a practical context is that individuals would be criminalised on the grounds of making an offer to an individual who agreed to sexual activity because she was acting heteronomously. While it can be argued that the producer who offers to make the aspiring actress a star is taking advantage of her pre-existing factors, such as poverty, and that she is coerced into accepting his offer due to her financial condition, his actions are not coercive. The aspiring actress will not be worse off if she refuses his offer.

In relation to the Formula of Autonomy (FA), Soble contends that:

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<sup>786</sup> D in the example above.

<sup>787</sup> Kant, *Critique of Pure Reason* (224), 377-8.

<sup>788</sup> Kant *Groundwork of the Metaphysics of Morals* (n4), 78.

<sup>789</sup> Kant *The Metaphysics of Morals* (n255), 62.

<sup>790</sup> Waldron, 'Moral Autonomy and Personal Autonomy' (n149), 308-14.

A person providing free and informed consent to an action or to interactions with another person is, in general for Kant, a necessary but not sufficient condition for satisfying the Second Formulation.<sup>791</sup>

In addition, Kantian autonomy requires that treating someone as a person involves taking on the other's ends as if they were his own ends.<sup>792</sup> As stated previously, Kant contends that:

[T]he man who has in mind to make a false promise to others will see at once that he is intending to make use of another man merely as a means to an end he does not share. For the man whom I seek to use for my own purposes by such a promise cannot himself agree with my way of behaving to him, and so cannot himself share the end of the action.<sup>793</sup>

Thus, in order to adhere to the CI within a sexual context an individual must take on the end of others for their own sake, not because that is an effective method of advancing his own goals in using others. It is important to note that the FA emphasises that individuals must also treat humanity 'never simply as a means, but always at the same time as an end'. According to Soble, 'this weaker variation of how to satisfy the Second Formulation may be important in Kant's account of the morality of work-for-hire and of sexual relations'.<sup>794</sup>

There is a real danger that the benefits of protecting sexual autonomy within a Kantian framework are lost if it is accepted that sexual activity is only permissible within the confines of marriage. Kant suggests that it is permissible in some contexts to use another person as a means or treat the other as an object, merely with the other's free and informed consent, provided an individual respects the humanity of the other.<sup>795</sup> This is especially relevant in scenarios involving an imbalance of power such as the doctor-patient relationship.

A complainant who engages in sexual activity in exchange for a benefit is consenting under the SOA 2003. However, according to Kant:

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<sup>791</sup> A. Soble, 'Sexual use and what to do about it: Internalist and externalist sexual ethics' in A. Soble (ed), *The Philosophy of Sex* (4<sup>th</sup> edn, Rowman & Littlefield 2002), 228.

<sup>792</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 92.

<sup>793</sup> Ibid.

<sup>794</sup> Soble (n791), 228.

<sup>795</sup> Kant, *The Metaphysics of Morals* (n255), 127.

[T]o allow one's person for profit to be used by another for the satisfaction of sexual desire, to make of oneself an Object of demand, is to dispose over oneself as over a thing and to make of oneself a thing on which another satisfies his appetite, just as he satisfies his hunger upon a steak. But since the inclination is directed towards one's sex and not towards one's humanity, it is clear that one thus partially sacrifices one's humanity and thereby runs a moral risk. Human beings are, therefore, not entitled to offer themselves, for profit, as things for the use of others in the satisfaction of their sexual propensities.<sup>796</sup>

Therefore, there appears to be a conflict between Kantian autonomy and the Sexual Offences Act 2003 (SOA 2003). In his critique of the Kantian concept of 'using another person', Mappes suggests that it is best understood by reference to the notion of 'voluntary informed consent'.<sup>797</sup> He writes that:

A immorally uses B if and only if A intentionally acts in a way that violates the requirement that B's involvement with A's ends be based on B's voluntary informed consent.<sup>798</sup>

He further argues that using another person can occur in at least two ways 'via *coercion*, which is antithetical to voluntary consent; and via *deception*, which undermines the informed character of voluntary consent'.<sup>799</sup> Thus, lying or withholding relevant information from the complainant, undermines her rational decision making and violates her sexual autonomy within a Kantian framework. Obtaining 'consent' under such circumstances could result in the complainant's sexual autonomy being undermined. Since there are a host of cases in which a defendant sexually uses another because he has employed deception in a way that undermines the informed character of the complainant's consent to sexual interaction, the question that should be asked is did the complainant understand the act that she was consenting to?<sup>800</sup> In *Setting the Boundaries*, the Home Office recommended that 'it is important for society as a whole for sexual relationships to be based on mutual respect and

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<sup>796</sup> Kant *Lectures on Ethics* (n21), 237.

<sup>797</sup> Mappes (n719), 208.

<sup>798</sup> Ibid.

<sup>799</sup> Ibid.

<sup>800</sup> Herring, 'Mistaken Sex' (n11), 514.



understanding'.<sup>801</sup> Herring's approach is also consistent with Kantian autonomy when he writes that 'in sexual relations, people are entitled to expect their partners not to consider solely their own interests but rather engage in a cooperative and mutually beneficial relationships'.<sup>802</sup>

Deceit, in a similar manner to force and coercion, can vitiate consent because it manipulates a complainant into acting against her will.<sup>803</sup> According to Herring:

[D]eception can be regarded as worse than a threat in that the deception uses the victim's own decision-making powers against herself: rendering her an instrument of harm against herself.<sup>804</sup>

Herring gives the example of Ted, who deceives Mary into believing that he loves her. As a result she buys him gifts and they engage in a sexual relationship. Ted has intentionally deceived Mary, and therefore under s 76 it must be conclusively presumed that Mary did not consent and that Ted did not reasonably believe that she consented to the relevant act.<sup>805</sup> This argument is based on the fact that Mary's consent was conditional upon Ted loving her. Therefore, the jury should consider what the parties understood the sexual act to be about.<sup>806</sup> Applying Kantian notions of autonomy to Herring's example, it can be seen that Ted's deception was employed in order to procure sexual activity with Mary. The use of deception by Ted allowed him to sexually use Mary simply as a means. It is submitted that withholding information, which the defendant knows will affect her decision, from the complainant will also result in violating her sexual autonomy.

Herring's proposal is that the defendant knew, or ought to have known, that the complainant was mistaken about something that would make a difference to her decision for which he is criminally liable since there was not valid consent to the sexual activity.<sup>807</sup> In *R v Konzani*,<sup>808</sup> the defendant withheld information about his HIV status from the complainants. It is argued

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<sup>801</sup> Home Office *Setting the Boundaries* (n26), para 1.3.2.

<sup>802</sup> Herring, 'Mistaken Sex' (n11), 515.

<sup>803</sup> Ibid.

<sup>804</sup> Ibid.

<sup>805</sup> Ibid, 519.

<sup>806</sup> Ibid.

<sup>807</sup> Ibid, 518.

<sup>808</sup> Discussed in chapter four.

that in such a case, a defendant who withholds the disclosure of such information in order to increase the possibility of gaining the complainant's consent, and if the complainant does consent, the defendant has used the complainant for his own gratification. His deception has violated her sexual autonomy within a Kantian framework.

### **Internal obstacles**

According to Feinberg:

There are internal positive constraints such as headaches, obsessive thoughts, and compulsive desires; internal negative constraints such as ignorance, weakness, and deficiencies in talent or skill.<sup>809</sup>

Kant viewed human freedom as the ground of both morality and dignity.<sup>810</sup> Rationality requires an individual to act on her own law. Therefore, to what extent is an individual, who is hindered by internal constraints, free in Kantian terms? According to Kant, freedom is the ability to make laws for oneself. Self-determination is essential to the protection of sexual autonomy within a Kantian model because it allows for the fact that an individual who is free from external constraints may still be affected by desires and principles which are shaped by her environment. Therefore, by acknowledging internal constraints may impact on sexual autonomy suggests that there may be internal obstacles to the application of Kantian theory.

The difficulty in applying Kantian theory to the protection of sexual autonomy in a practical context is that Kant excluded desires from the realm of moral motivation. Thus, an individual must be free from empirical determination in order to justify his sense of moral obligation and responsibility.<sup>811</sup> Although individuals participate in the empirical world where causality determined interactions occur,<sup>812</sup> Kant's free agent is described by Ortiz-Millan as a 'transcendent being, beyond the realm of natural causality'.<sup>813</sup> Since heteronomy is dependent

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<sup>809</sup> Feinberg, *Social Philosophy* (n757), 13.

<sup>810</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 97.

<sup>811</sup> Kant, *Critique of Pure Reason* (n224), 384.

<sup>812</sup> Ortiz-Millan (n174), 323-33.

<sup>813</sup> Ibid.

on external factors, it follows that an individual who acts on his own desires cannot be free and autonomous. Kant states that:

Inclination is blind and servile, whether it is kindly or not; and when morality is in question, reason must not play the part of mere guardian to inclination but, disregarding it altogether, must attend solely to its own interest as pure practical reason'.<sup>814</sup>

Therefore, in order for an individual to attain freedom, he must be outside the realm of empirical causality and must disregard inclinations and desires. According to Kant, the will's independence from inclination is an essential prerequisite of the autonomy of the will.<sup>815</sup> In relation to feelings, Kant states that: 'it is impossible to reach a common agreement on feelings, because feeling is by no means uniform'.<sup>816</sup> Ortiz-Millan argues that Kant's opinion on feelings can be extended to desires.<sup>817</sup> Thus, desires are also not uniform and vary from one person to another.

The CI requires individuals to act only on maxims through which they can at the same time will that such maxims become universal law. Feelings, desires and empirical inclinations are contingent and do not provide an objective basis for grounding moral obligations. They are described as contingent and subjective and therefore they cannot create moral obligations binding everyone. Feelings and desires cannot serve as the basis for moral principles because they are defined in terms of self-interest.<sup>818</sup> Kant viewed morality and self-interest as opposite concepts.<sup>819</sup> An individual acting out of self-interest would not be able to attain a kingdom of ends in which he treats others always as ends and never as means, since acting out of self-interest implies the pursuit of his own interest over the interests of others. However, as stated previously, a defendant will not violate another's sexual autonomy provided he does not treat a complainant simply as a means but always at the same time as an end by respecting her humanity.

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<sup>814</sup> I. Kant, *Critique of Practical Reason* (M. Gregor tr, CUP 1997), AA 05: 118.

<sup>815</sup> Kant, *Critique of Practical Reason* (n285), 19.

<sup>816</sup> I. Kant, *Observations on the Feeling of the Beautiful and the Sublime* (J. T. Goldthwait tr, 2<sup>nd</sup> edn, University of California Press 2003), 73.

<sup>817</sup> Ortiz-Millan (n174), 323-33.

<sup>818</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 91.

<sup>819</sup> Ortiz-Millan (n174), 323-33.

To circumvent the concerns regarding feelings and desires relating to Kantian autonomy in a practical context, it is important to allow for the inclusion of desires and feelings in Kantian autonomy in order to give rise to a more realistic picture of moral psychology.<sup>820</sup> Ortiz-Millan argues that:

Kant's fear of including desires in his picture of moral motivation on the grounds of their being linked to pleasure and self-interest responds to a misconception. Desires are not necessarily linked to pleasure and self-interest...desires are bound to reason, to rational principles and to cognitive states, thus, allowing a shared backgrounds that makes possible their deliberation, a reasonable resolution of divergences, and makes them susceptible to following moral principles.<sup>821</sup>

However, Ortiz-Millan concedes that placing desires within the bounds of space of reasons does not render them a good and objective enough basis for moral obligations.<sup>822</sup> If moral obligations were dependent on desires they would turn an individual's CI into a Hypothetical Imperative (HI).<sup>823</sup> Ortiz-Millan contends that desires and feelings can be introduced to the realm of moral motivations without the fear that they are contrary to Kantian theory.<sup>824</sup>

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<sup>820</sup> Ibid.

<sup>821</sup> Ibid.

<sup>822</sup> Ortiz-Millan (n174), 323-33.

<sup>823</sup> Ibid, 325.

<sup>824</sup> Ortiz-Millan (n174), 323-33.

## **Conclusion**

This chapter has examined the barriers to using Kantian autonomy as a method of protecting sexual autonomy in a practical context by adopting Feinberg's classification of external and internal constraints.

Kantian autonomy involves having the capacity for rational self-governance. Kantian autonomy does not involve individuals having the freedom to do whatever they desire. To be autonomous, within a Kantian framework, is to be a member of a kingdom of similar autonomous individuals who are ends in themselves. Kantian autonomy is, therefore, not associated with the satisfaction of individual desires. Instead, Kantian autonomy is the capacity to act on rational principles and to exercise moral reasoning through freedom of choice. Self-governance ensures that an individual's decisions are not influenced by the actions of others. Autonomy is protected within a Kantian framework when an individual has the opportunity to revise her choices when further evidence arises, suggesting that her previous choices were poor.

Morality, according to Kant, comprises a set of demands that are not only valid for the individual but are valid for all rational beings. Kantian autonomy requires that every person is worthy of respect because individuals are rational beings, capable of reason. Reason can command the will in two different kinds of imperative. One kind is the HI which uses instrumental reason. Kant contrasts the HI, which is always conditional, with an unconditional imperative known as the CI. According to Kant, the CI commands without reference to or dependence on any further purpose. This is particularly important in relation to the protection of sexual autonomy because a person who uses another purely for their own sexual gratification may be obeying the HI rather than the CI. Kant offers several formulae of the CI which, it was argued in chapter two, all amount to the same formula.

The difficulty with applying Kantian autonomy in a practical context is that Kant does not seem to distinguish between genuine needs and mere wants. The difficulty with this lack of distinction is that an individual lacks autonomy, within a Kantian framework, whether she is acting according to her inclinations or whether her choices are limited due to coercive pressures. It is submitted that in the example used in this chapter, the model has far greater

choice than the struggling actress and therefore it cannot be said that both lack autonomy. An interpretation of Kantian autonomy, which focuses on the essential elements of Kantian theory, can facilitate the protection of sexual autonomy in a practical context. This would require examining whether an individual was used by another simply as a means. It would also involve examining whether an individual's actions can be universalised. This follows Kant's argument that 'the idea of the will of every rational being as universally legislating will'.<sup>825</sup> This can be taken to mean that every rational individual must occupy the position of universal legislator for their actions and their actions, in turn, must be capable of being applied universally. An individual who is constrained by the actions of another cannot be said to be self-governing. The Formula of Universal Law (FUL) requires an individual's actions to be capable of being universalised. Kant's idea that 'the will of every rational being as universally legislating will' can be associated with allowing individuals to limit their tendencies and taking the concerns of others into account.<sup>826</sup> This argument is supported by the FH, which requires that individuals are treated never simply as a means, but always at the same time as ends. Failure to comply with the FH, suggests that an individual may be violating another's sexual autonomy.

In order for Kantian autonomy to be applied in a practical context, the relationship between the parties should be taken into account. Deception, coercion and threats to obtain sexual activity violate sexual autonomy within a practical context because they are not in accordance with the FH. The difficulty with applying Kantian autonomy in a practical context is that inducements can be taken to amount to coercive conduct. A free individual within a Kantian model is one who is free from inclinations and desires. It is submitted that Kantian autonomy can be applied in a practical context in situations involving inducements that may appear to be coercive conduct. This can be achieved by focusing on two elements of Kantian autonomy: first, individuals should only act on maxims through which they can at the same time will that such maxims become universalised; second, the FH which requires that individuals are treated never simply as a means, but always at the same time as ends. Kantian autonomy involves the capacity to reason and to act independently of inclinations. As stated previously, inclinations can form a part of a person's decision-making process provided

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<sup>825</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 93.

<sup>826</sup> K. Deligiorgi, *The Scope of Autonomy: Kant and the Morality of Freedom*. (OUP 2012), 173.

actions are directed towards the motive of duty. A person is not acting according to the CI if he acts solely to satisfy his preferences.

## Chapter Six: Conclusion

This thesis has established that Kantian autonomy differs from other notions of autonomy because it is concerned with the status of individuals as universal law givers, rather than merely universal law followers. In order to be autonomous within a Kantian framework, individuals are required to be members of the Kingdom of Ends (KE), whereby individuals are members of a kingdom of similar autonomous individuals to respect the humanity of others. Kantian autonomy, therefore, requires individuals to never simply use another as a means, but always at the same time as an end. It was shown in chapter one that Kantian autonomy does not prohibit individuals from using others as means, what is forbidden is failing to treat another person at the same time as an individual capable of free choice. This is an important proviso because it facilitates the practical application of Kantian autonomy. Accordingly, an individual must never use herself or others simply as means to the attainment of results founded on inclinations.

It has been shown that removing the focus from the requirement of force to a consent-centric model increases the protection of sexual autonomy by widening the scope of situations whereby the complainant's consent is said to be absent. A consent-centric model under the current law provides more adequate protection of sexual autonomy than the previous law. The current law fails to adequately protect sexual autonomy in cases involving deception as to the defendant's HIV status,<sup>827</sup> wealth and religion. Deceptions as to gender, on the other hand, may be capable of vitiating consent.<sup>828</sup>

In order to determine whether an individual is free, she must be able to set her own ends. An individual who has been deceived into consenting to sexual intercourse cannot be said to be consenting because, according to Kantian autonomy, she is being used simply as a means. The defendant in such a case is using deception as a means to procure sexual activity, therefore, his actions are heteronomous. The Formula of Autonomy (FA) is based on the principle that an individual formulates for herself the decisions which she acts upon. In order

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<sup>827</sup> In *R v EB* [2006] EWCA Crim 2945, the Court of Appeal considered whether non-disclosure of HIV status could vitiate consent, and concluded that it did not. The Court did, however, state that HIV status could vitiate consent in circumstances where the complainant had been positively assured that the defendant was not HIV positive.

<sup>828</sup> *R v McNally (Justine)* [2014] 2 WLR 200.



to be autonomous, an individual must not be affected by the actions of others. In a practical context, this means that an individual must not be deceived or mistaken with regards to her decision to engage in sexual activity. A person who decides to employ deception in order to procure sexual activity is using another for the fulfilment of his own desires. It follows that he is using her simply as a means and not at the same time as an end. Moreover, his actions cannot be universalised, because not only are his actions incompatible with the Categorical Imperative (CI), but his actions also fail to further her ends. Kantian autonomy is, therefore, a principle whereby an autonomous agent is one who is capable of making decisions which can be acted on by other individuals. The value of adopting Kantian autonomy in the protection of sexual autonomy is that it emphasises the ‘humanity’ of individuals, which is the individual’s capacity for autonomous choice. ‘Humanity’ includes the capacity to act on one’s own judgement. Deception, mistakes induced by the defendant and coercive conduct, adversely affect the capacity of an individual to formulate decisions for herself. Her actions are affected by the actions of another and, therefore, she lacks autonomy according to a Kantian framework.

One of the difficulties of adopting Kantian autonomy is determining to what extent it is possible to conclude that an autonomous agent is free from external authority which hinders her capacity to form decisions. An autonomous individual, within a Kantian sense, is one who has the capacity to initiate her own actions, independently of external constraints. Kant does not define external constraints, however, chapter five applied Feinberg’s classification of external constraints to Kantian autonomy in a practical context. Feinberg argues that external constraints can be both negative (barred window or threat of violence) and positive (lack of money or lack of transportation).

Threat of immediate violence is a form of an external negative constraint on a person’s decision-making process. The person threatening violence in order to procure sexual activity is clearly not treating her as an autonomous individual. He is treating her simply as a means and not at the same time as an end. In such a scenario, the complainant has suffered a violation of her sexual autonomy within a Kantian framework. Difficulties arise in determining whether a violation of sexual autonomy has occurred in situations involving external positive constraints, such as lack of money. The reason for this difficulty is that

Kant does not distinguish between wants and needs. According to Kant, if an individual is acting purely on inclinations from external influences, her will is said to be determined heteronomously. An individual who is acting heteronomously is acting according to the Hypothetical Imperative (HI) and, therefore, lacking autonomy. This outcome gives rise to the question: are not all actions motivated by certain desires or inclinations that are determined by external influences? Kant asserts that ‘everything in nature works in accordance with laws’.<sup>829</sup> However, individuals cannot obey only the laws of physics, otherwise there would be little difference between an individual and an inanimate object.

According to Kant, rational agents are capable of freedom if they can act according to laws which they provide for themselves, and which are also capable of universalisation. The will is the power to choose independent commands or inclinations. Kant defines reason as, ‘pure practical reason, which legislates *a priori*,<sup>830</sup> regardless of all empirical ends’.<sup>831</sup> With regards to the protection of sexual autonomy in a practical context, Kant’s interpretation of reason requires an individual, who aims to procure sexual activity, to act on decisions that are made independently of particular experiences,<sup>832</sup> to act according to the CI,<sup>833</sup> and to ensure that the autonomy of others is respected in that their freedom of the will is exercised in accordance with a self-given law.

To analyse the application of Kantian autonomy in cases which involve non-violent coercion, the first step is to examine the distinction between threats and offers. Secondly, consideration must be given to whether the offer can be considered impermissible within a Kantian context. Generally, offers enhance an individual’s opportunities, while threats impair autonomy and limit freedom. An employer who threatens to dismiss an employee unless she submits to sexual activity is violating her autonomy within a Kantian framework. His actions are impermissible according to the moral law because he is acting heteronomously. Moreover, he is treating the individual simply as a means in order to satisfy his aim of procuring sexual activity. An employer who informs his employee ‘you will lose your job unless you submit

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<sup>829</sup> Kant, *Groundwork of the Metaphysics of Morals* (n4), 76.

<sup>830</sup> Known or formed independently of particular experience.

<sup>831</sup> I. Kant, ‘On the Common Saying, This May be True in Theory, But it Does not Apply in Practice’ in R. Hans (ed) and H. B. Nisbet, (trans), *Kant’s Political Writings* (CUP 1970), 73.

<sup>832</sup> *A priori*.

<sup>833</sup> The moral law.

to sexual intercourse', is clearly violating her sexual autonomy because he is making a threat. The employee's freedom is being limited because she has to choose between submitting to sexual activity or losing her job. The threat of losing her job amounts to depriving her of a benefit to which she is entitled.

An employee who faces dismissal as a result of gross misconduct in the work place, and is informed by her employer 'you can keep your job if you have sexual intercourse with me', is provided with an opportunity to maintain her employment. In this scenario, the employee is not entitled to her job, and therefore, the employer's proposal is an offer. According to Kantian autonomy, the employer is violating her sexual autonomy because not only is the employer acting contrary to the Formula of Autonomy (FA), but the employee's actions are based on her desire to maintain her employment, and therefore, she is acting heteronomously. In a practical context, it might be unjust to criminalise the actions of an individual who takes advantage of another's social or economic conditions.<sup>834</sup> Schulhofer argues that:

Even when background conditions severely limit a woman's options, it may make sense to honor [sic] the choices she makes. Due respect for her autonomy may even require us to do so. And we can condemn the social constraints as unjustified, without being logically compelled to condemn her male partner's behavior [sic] as improper. If he treats her with dignity and respect, his conduct may not call for any moral criticism.<sup>835</sup>

Applying Kantian autonomy, in a practical context, will require distinguishing between the wrongfulness of external constraints and the wrongfulness of the defendant's conduct. In order to make this distinction, it must be decided whether an inducement should be considered a threat. This is not always a simple exercise, as is demonstrated by the scenario where a defendant refuses to continue being in a relationship unless his girlfriend submits to his demand for sexual intercourse.<sup>836</sup> While his demand might appear to be a threat to terminate their relationship unless she submits to his demands, the underlying factor is whether his proposal deprives her of a right to which she is entitled to. Legally, she has no

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<sup>834</sup> *R v Kirk* [2008] EWCA 434.

<sup>835</sup> Schulhofer (n13), 108.

<sup>836</sup> *Ibid*, 121.

right to compel him to continue dating her on her terms and, therefore, his proposal may be considered an offer.<sup>837</sup>

Sexual autonomy is protected, within a Kantian framework, in the dating scenario because the defendant's actions are based on satisfying his inclinations, and therefore he is using her merely as a means and not as an end. Theoretical Kantian autonomy is an effective method for the protection of sexual autonomy because it focuses on the actions of the defendant. Kantian autonomy examines whether a proposal is aimed at treating a complainant simply as a means. The barrier to the application of Kantian autonomy in a practical context relates to the issue that it may prove problematic to prosecute such cases due to the lack of sufficient evidence.

A further issue of concern in relation to the practical application of Kantian autonomy is over-extending the limits of the criminal law to include scenarios involving deception in relation to the defendant's feelings or an intention to marry. Kantian autonomy also renders it impermissible where a husband conceals his infidelity from his spouse and continues to engage in sexual intercourse with her.<sup>838</sup> Kantian autonomy makes it an obligation not to deceive or conceal facts which are important to a person's decision to engage in sexual activity. Any deception regarding such a fact might vitiate her consent to engage in sexual activity. The current law does not require an individual to inform his sexual partner of the truth about whatever might be of concern to her in deciding whether to engage in sexual activity. Kantian autonomy allows for the purpose of the act, under s 76 of the Sexual Offences Act 2003 (SOA 2003), to be extended to include what the parties understood the act of sexual intercourse to be about. Using Herring's paradigmatic case to illustrate the application of Kantian autonomy in a practical context:

Ted tells Mary he loves her and would like to marry her. As a result she buys him presents and lends him money. They also engage in sexual relationships. In fact

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<sup>837</sup> Ibid.

<sup>838</sup> Sexual Offences Act 1956, s 3.

Ted is a rogue. He has no feelings towards Mary and is known to have behaved in this way towards many women.<sup>839</sup>

Ted's actions do not fall within s 76, however, if the facts could be proved, he could be liable for obtaining property by deception. However, Mary's sexual autonomy is violated within a Kantian framework because Ted is employing deception to procure sexual activity. He is using Mary simply as a means to satisfy his own desires. Under a Kantian framework, if Mary discovered his deception prior to engaging in sexual intercourse, Ted could be liable for attempting to procure sexual intercourse. Gross argues that:

[L]iability for attempted rape seems absurd here, and with good reason. Unlike the fraudster attempting to obtain property, Ted's attempt to get Mary into bed does not threaten any genuine harm. Mary may be thankful for learning the truth and being able to avoid the hurt of a very disagreeable episode. But she can hardly claim deliverance from harm.<sup>840</sup>

Gross' argument focuses on the harm Mary has avoided rather than on the protection of her sexual autonomy. It was discussed in chapter one that Gardner and Shute adopt a Kantian perspective in relation to identifying the harm of rape. The authors state that:

Rape is humiliating even when unaccompanied by further affronts, because the sheer use of a person, and in that sense the objectification of a person, is a denial of their personhood. It is literally dehumanizing.<sup>841</sup>

While the above Kantian analysis assists in identifying the moral wrong of rape, it does not state whether or not such conduct should be regarded as criminal.<sup>842</sup> Gardner and Shute's analysis of a Kantian model can assist in evaluating whether any given conduct violates sexual autonomy:

By much the same argument which condemns rapists, those of us who are discussing, legislating, implementing, and enforcing people's rights must also

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<sup>839</sup> Herring, 'Mistaken Sex' (n11), 511.

<sup>840</sup> Gross (n249), 225.

<sup>841</sup> Gardner and Shute (n125), 20.

<sup>842</sup> G. Dingwall, 'Addressing the Boundaries of Consent in Rape' (2002) 13 KCLJ 31, 34.

regard them as people, as beings with value other than use-value. In particular we must regard them as moral agents capable of understanding their own value and making up their own minds about their relationships with others. We must work on the assumption that they respect or else we do not ourselves respect them...The truth is that [various sexual options] often are dehumanizing, and therefore to be avoided by the person who is confronted with them. But allowing people nonetheless to pursue them, is up to a point, rehumanizing, because it credits them with moral agency, without which credit their dehumanization is only compounded.<sup>843</sup>

This argument draws attention to the fact that a Kantian model can accord a degree of moral credit to individuals who consent to sexual activity, even when what they are engaging in may be objectively dehumanizing.<sup>844</sup> This Kantian analysis, however, does not assist in determining which types of non-violent coercions and deceptions should be criminalised. The above analysis may assist in the application of Kantian autonomy in a practical context, because it requires the recognition of the complainant's moral credit and holding her, in certain circumstances, responsible for consenting to sexual activity, despite the use of coercive conduct by the defendant. The example discussed above, involving a defendant who threatens to terminate the relationship unless the complainant agrees to his sexual demands, can assist in illustrating that the over-criminalising aspect of Kantian autonomy can be curtailed. According to Schulhofer, sexual autonomy includes 'the freedom to decide whether and when to terminate any personal relationship'.<sup>845</sup> The defendant's proposal does not appear to deprive the complainant from any right which she is entitled to. The freedom to terminate a relationship unless the other party agrees to the sexual demands must be determined in the context of the relationship. A husband who threatens to divorce his wife, a full-time mother with limited career prospects, unless she agrees to his sexual demands is violating her sexual autonomy within a Kantian framework. His proposal is a threat because he is forcing her to choose between sexual activity and the security of her marriage.

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<sup>843</sup> Gardner and Shute (n125), 20.

<sup>844</sup> Dingwall (n842), 34.

<sup>845</sup> Schulhofer (n13), 123.

Applying Kantian autonomy in a practical context widens the scope of non-consensual sexual offences beyond the narrow constraints of sections 75 and 76. A jury would, therefore, have to determine, on a case-by-case basis, whether a complainant consented to sexual intercourse. This allows individuals to set their own standards on what facts are relevant to them, when deciding whether to engage in sexual activity. Implementing Kantian autonomy in a practical context could attract the same criticism that was levelled on *Olugboja*; the lack of determinacy and the potential for identical coercive conduct to be treated differently by different juries. While a Kantian approach may engender unpredictability, the *mens rea* requirement ensures that a defendant will not be prosecuted where he did not realise that the complainant would regard a particular fact as fundamental to her consent.<sup>846</sup> Moreover, the prosecutorial policy must follow the Evidential Stage of the Full Code Test, as set out in the Code for Crown Prosecutors.<sup>847</sup> The decision to prosecute will, therefore, depend on the likelihood of satisfying the burden of proof on the available evidence.

Applying Kantian autonomy to the non-consensual offences contained in sections 1-4 of the SOA 2003 would increase the protection of sexual autonomy by including scenarios beyond those found in ss 75 and 76. This would allow for the protection of sexual autonomy in cases where the defendant used non-violent coercion to procure sexual activity. It would also allow for the protection of sexual autonomy in cases where a female defendant falsely informed a male complainant (who did not wish to impregnate her) that she was on the pill. Kantian autonomy is similar to the decision in *Olugboja*, in that it focuses on the state of mind of the complainant and allows individuals to set their own standards in relation to the factors which affect their decision to engage in sexual activity. However, Kantian autonomy is more comprehensive in that it focuses on whether the individual is being used simply as a means. It also requires that the proposal does not deprive the individual of any rights to which she is entitled. While the Court of Appeal in *Olugboja* allowed non-violent coercion to vitiate consent, this decision does not appear to have made any significant practical impact.<sup>848</sup> This may be due to the practical difficulties associated with proving lack of consent in cases where violence is absent. Such difficulties may also arise in relation to the practical application of

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<sup>846</sup> Herring, 'Mistaken Sex' (n11), 517.

<sup>847</sup> Crown Prosecution Service, *Code for Crown Prosecutors* (HMSO 2013), para 4.1- 4.6.

<sup>848</sup> Edwards (414), 340.

Kantian autonomy. The wide range of non-violent coercive conduct and deceptions which are capable of being protected by a Kantian model may influence charging practice. The police may be sceptical of a complainant who alleges that she has been raped because the defendant deceived her about his economic status. Moreover, individuals may be reluctant to report violations of their sexual autonomy if they have no physical evidence to corroborate their allegations.

A further criticism of Kantian autonomy may centre on the fact that it is not uncommon for individuals to tacitly conceal facts about themselves. Rubenfeld argues that:

Clothing and underclothing can falsify. Make-up and hair dye can deceive. All cosmetics misrepresent. They can designedly and quite effectively convey false information concerning age, hair color [sic], teeth, skin color [sic] or quality, bodily characteristics, genetic predispositions, ethnicity, and so on...Many of us would undoubtedly be in jail were every one of them criminal.<sup>849</sup>

This above argument fails to take into account the fact that if an individual is misled about a fact which is fundamental to her decision-making, then her sexual autonomy is not respected within a Kantian context. Rubenfeld concedes that certain lies told to obtain sex ‘could sensibly be singled out by statute and criminalized [sic]’, such as concealing a sexually transmitted disease.<sup>850</sup> The author, however, does not elaborate on how certain deceptions can ‘sensibly be singled out’ by statute and criminalised. His argument fails to take into account that deceiving another about a fact which is material to their decision-making process, violates the FA and amounts to an objectification of another. Deceptions used to procure sexual activity prevent a person from exercising self-determination through which the rational will is capable of giving itself law through reason. In *R v McNally (Justine)*,<sup>851</sup> which concerned the material deception of the complainant, the Court of Appeal dismissed the defendant’s appeal against her conviction in relation to six counts of assault by penetration contrary to s 2 of the SOA 2003. The defendant, when a 13 year-old-girl, had met the complainant, who was a year younger, on a social networking website. The defendant

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<sup>849</sup> Rubenfeld (n22), 1416.

<sup>850</sup> Ibid.

<sup>851</sup> [2014] 2 WLR 200.



claimed to be a boy and a relation developed between her and the complainant. The defendant visited the complainant on four occasions, when the complainant was aged 16, dressed as a boy. During these visits, there were numerous instances of the defendant orally and digitally penetrating the complainant. The Court stated that some deceptions, such as in relation to wealth, would not be sufficient to vitiate consent.<sup>852</sup> The Court referred to Lord Judge CJ's observation in *R (F) v Director of Public Prosecutions*,<sup>853</sup> that the evidence relating to 'choice' and the 'freedom' to make any particular choice must be approached in a broad common sense way',<sup>854</sup> as a method of determining the circumstances which vitiate consent.<sup>855</sup> The Court further stated that 'the sexual nature of the acts is, on any common sense view, different where the complainant is deliberately deceived by a defendant into believing that the latter is a male'.<sup>856</sup> The emphasis on active deception leaves the question open in relation to whether non-disclosure would vitiate consent. A Kantian model, on the other hand, is capable of providing more certainty in relation to the protection of sexual autonomy, because it focuses on whether the complainant was used merely as a means and not as an end.

### **The role of law, practice and policy in relation to a Kantian model**

The essence of this thesis has been to advocate and formulate a Kantian framework as a method for interpreting the current law, in order to adequately protect sexual autonomy. The law of sexual offences no longer focuses on the application of force by the defendant nor does it require evidence of active resistance on the part of the complainant. Therefore, the aim of using a Kantian framework is to protect sexual autonomy in cases involving non-violent coercion and deception. In addition to the barriers discussed in chapter five, it is also necessary to examine the implications for law, policy and practice on adopting a Kantian framework in relation to protecting sexual autonomy.

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<sup>852</sup> Ibid, 207.

<sup>853</sup> [2014] 2 WLR 190.

<sup>854</sup> Ibid, paras 25 and 26.

<sup>855</sup> *R v McNally (Justine)* [2014] 2 WLR 200, 207.

<sup>856</sup> Ibid.

The current jury direction, given by the judiciary, in relation to the meaning of consent under s 74, fails to highlight the fact that the jury must take into account any factors which are relevant to the complainant in connection with her decision to engage in sexual activity. In order to adhere to a Kantian model, a jury must be directed to the fact that conduct such as active deception or capitalising on the complainant's mistake can negate consent. The essence of the direction should be that conduct by the defendant which seeks to use the complainant only for his sexual gratification may be evidence that she did not consent.

In order to protect sexual autonomy in sexual offences cases, it is not sufficient to merely adopt a Kantian-compatible jury direction. Jury attitudes in relation to rape myths must also be addressed. Research into rape myths has shown that stereotypical conceptions of female behaviour can have detrimental effects on the resultant verdicts.<sup>857</sup> Munro and Ellison note that the:

[F]lexibility that exists with regard to the determination of the presence or absence of consent creates scope for the incorporation of stereotypical views about the relationship between women, intoxication and sexual activity into the decision-making process.<sup>858</sup>

The authors note that there was a high level of insistence amongst the participants of the need for information about the complainant's past sexual history.<sup>859</sup> A Kantian framework can assist in eliminating some of these attitudes, displayed by mock jurors, because it draws attention to the state of mind of the complainant and focuses attention on the reason behind the coercive conduct or deception.

A Kantian model protects sexual autonomy by widening the scope of circumstances in which a complainant's agreement to sexual activity is secured as a result of conduct involving deceptions as to marital status, wealth and religion. Moreover, a Kantian model protects

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<sup>857</sup> E. Finch and V. E. Munro, 'Intoxicated consent and the boundaries of drug assisted rape' [2003] Crim LR 773; L. Kelly, J. Lovett and L. Regan Child, *A Gap or a Chasm? Attrition in Reported Rape* (Home Office 2005); V. E. Munro and L. Ellison, 'Turning mirrors in windows? Assessing the impact of (mock) juror education in rape trials' (2009) British Journal of Criminology 49(3) 363; J. Temkin and B. Krahe, *Sexual Assault and the Justice Gap: A Question of Attitude* (Hart Publishing 2008).

<sup>858</sup> E. Finch and V. E. Munro, 'Juror Stereotypes and Blame Attribution in Cases Involving Intoxicants' (2005) 45(1) British Journal of Criminology 25, 35.

<sup>859</sup> Ibid.

sexual autonomy in cases which do not involve active deception on the part of the defendant. However, the number of offences recorded by the police is a small proportion of the number of rapes which are committed.<sup>860</sup> One reason for this may be due to unreported rapes. Reasons for non-reporting include:

Feelings of shame, humiliation and self-blame; the desire to keep the rape secret...; the wish to avoid...court appearances which are regarded as an ordeal; the wish to avoid trial by newspapers' publicity.<sup>861</sup>

Another reason for the lack of reporting is that women who do report rape do not necessarily have their complaints accepted by the police.<sup>862</sup> In her study conducted in 1997, Temkin notes that 'old police attitudes and practices, widely assumed to have vanished, are still in evidence and continue to cause victims pain and suffering'.<sup>863</sup> There is a strong possibility that deceptions relating to qualifications and marital status of the defendant might not be accepted as rapes by the police. This will render a Kantian model ineffective in a practical context.

In order for a Kantian model to operate in a practical context, juror and police attitudes to rapes and sexual assaults need to be addressed by focusing on the defendant's conduct which seeks to use the complaint purely to satisfy his sexual desires. Kennedy argues that:

[R]ape is one of the most serious and damaging offences. It is essential that the police and CPS co-ordinate our efforts and co-operate with each other to investigate thoroughly and prosecute effectively those responsible for this dreadful crime.<sup>864</sup>

A Kantian model requires all elements of the criminal justice system to focus on the state of mind of the complainant in order to give complainants the opportunity to report violations of their sexual autonomy and have the confidence to proceed with the prosecution process in order to ensure a conviction, without any fear that they will be put on trial. Education in

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<sup>860</sup> Temkin, *Rape and the Legal Process* (402), 14.

<sup>861</sup> L. J. F. Smith, *Concerns about Rape* (Home Office 1989), 3.

<sup>862</sup> Temkin, *Rape and the Legal Process* (402), 19.

<sup>863</sup> J. Temkin, 'Plus Ça Change: Reporting Rape in the 1990s,' (1997) 37(4) *British Journal of Criminology* 507, 507.

<sup>864</sup> Crown Prosecution Service, 'CPS and ACPO sign protocol handling rape cases' (Crown Prosecution Service, 7<sup>th</sup> March 2008) [http://www.cps.gov.uk/news/latest\\_news/115\\_08/](http://www.cps.gov.uk/news/latest_news/115_08/) accessed 19 July 2014.

society is necessary to ensure that a Kantian model is effective in a practical context. Ewing contends that:

Education would include training for those involved in the rape trial, including the prosecution, the judges and most importantly the jury and the public. Raising awareness of the effects of myths and stereotypes to those selected for jury service is important as their beliefs are highly relevant to the outcome. Education could begin in schools and continue, to reach the public at large via the media through for example, poster campaigns or adverts on the television.<sup>865</sup>

A Kantian model requires focus on the actions of the defendant and the effect of his conduct on the state of mind of the complainant. The relationship between the parties would also need to be examined. A Kantian model allows complainants to set their own standards in relation to matters which are fundamental to their consent.

## **Conclusion**

It has been shown that a consent-centric model is more effective at protecting sexual autonomy than a non consent-centric model. Both the current law and the law prior to the SOA 2003 protected sexual autonomy. While the old law did not provide a statutory definition of consent, sexual autonomy was protected by s 3 of the Sexual Offences Act 1956 (SOA 1956) in cases where sexual activity was procured by deception. However, this provision was not widely used and was repealed by the SOA 2003. The current law is capable of providing an effective method of protecting sexual autonomy in cases involving deception and non-violent coercion. This can be achieved by employing Kant's CI in determining whether an individual's autonomy has been violated. Kantian autonomy examines whether an individual has been used as merely a means and not as an end in themselves. If a defendant's actions cannot be universalised then he is acting contrary to Kant's moral law. The disadvantages relating to the practical application of Kantian autonomy, concern the issue of over-criminalising the most trivial of deceptions such as

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<sup>865</sup> K. Ewing, 'Attitudes and Responses in Light of the Low Conviction Rate' [2009] Plymouth Law Review 50, 68.

concealing one's name, occupation or religion. Lack of evidence in such cases will also hinder such cases being prosecuted or reported to the police. However, these disadvantages do not take away from the fact that a Kantian framework has the potential to protect sexual autonomy where a person's agreement to sexual activity has been obtained by deception or non-violent coercion, regardless of how trivial the deception is.

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